| | |
|---|---|
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Dickerson, Mechele
mdickerson@law.utexas.edu
512-232-1311
Ramachandran, Seetha
SRamachandran@proskauer.com
Dantowitz, Jeffrey
JDantowi@law.nyc.gov
212-356-0876

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# Amy Gordon

amygordon@utexas.edu | 646-707-9757 | 643 Carlton Avenue, Apt. 5, Brooklyn, NY 11238


May 7, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am a Litigation Associate in Proskauer's New York office writing to apply for a clerkship in your chambers, beginning in October 2025.

After a couple years honing my litigation skills at Proskauer, I am seeking a clerkship in order to devote more time to legal research and writing, and use the skills I have gained in the corporate sector to serve the public. As a Brooklyn native, I have a special interest in clerking in New York where I intend to continue pursuing my legal career. I have followed a number of your cases and would greatly value the opportunity to work with and learn from you.

My professional experience at Proskauer, and as a paralegal at Cleary Gottlieb and the ACLU, has included work on matters involving poor housing conditions, sanctions, securities fraud, data breaches, rural call completion, national security, and product liability. I also spent several months on secondment to the office of the New York City Corporation Counsel, which enriched my knowledge of commonly filed federal cases, such as those involving claims made under Section 1983.

As an intern for U.S. District Judge Nicholas Garaufis, I became familiar with the day-to-day operations of the Judge's chambers and worked closely with the clerks in conducting legal research and preparing judicial opinions and memos.

I am adept at handling multiple projects simultaneously, prioritizing and completing tasks quickly, while paying close attention to detail and producing high-quality work. I believe that my analytic, research, and writing skills, along with my strong work ethic, will enable me to successfully manage the responsibilities of a judicial clerk and make a valuable contribution to your chambers.

Please find attached letters of recommendation from Seetha Ramachandran (212-969-3455, sramachandran@proskauer.com), Professor Mechele Dickerson (512-232-1311, MDickerson@law.utexas.edu), and Jeffrey Dantowitz (JDantowi@law.nyc.gov).

Thank you for your consideration.

Respectfully,

Amy Gordon

# Amy Gordon

amygordon@utexas.edu | 646-707-9757 | 643 Carlton Avenue, Apt. 5, Brooklyn, NY 11238

## EDUCATION

**The University of Texas School of Law**, Austin, Texas
J.D., May 2020; GPA: 3.43

- THE REVIEW OF LITIGATION, Chief Notes Editor, 2019-2020, Staff Editor, 2018-19
- TEXAS JOURNAL ON CIVIL LIBERTIES AND CIVIL RIGHTS, Staff Editor, 2018-19
- Cybersecurity Graduate Fellow, Robert Strauss Center for International Security and Law
- Co-authored Army Court of Criminal Appeals Student Amicus Brief, supervised by Professor Stephen Vladeck
- Research Assistant for Professor Mechele Dickerson – conducted research and edited forthcoming book, *The Neglected Middle Class: Inequality, Race, and the Looming Economic Crisis*
- Juvenile Justice Clinic, Student Attorney
- Thad T. Hutcheson Moot Court Competition, Participant

**American University, School of International Service**, Washington, DC
B.A. *magna cum laude* in International Studies, May 2014
GPA: 3.79, University Honors Program, Dean's List

- Peking University Study Abroad Program, Fall 2012

## LEGAL EXPERIENCE

**Proskauer Rose LLP**, New York, NY
*Litigation Associate*, January 2021-Present; *Summer Associate*, Summer 2019

- Represent telecommunications company in litigation and data security investigation. Responsibilities include document review; drafting and responding to discovery requests; preparing for depositions; drafting briefs relating to discovery disputes and responses to regulatory inquiries; and legal research on wide range of issues from breach notification laws to privilege and document protections.
- Advise clients on sanctions compliance, particularly regarding recent U.S. sanctions on Russia and Iran.
- Represent Financial Oversight & Management Board responsible for restructuring of Puerto Rico's finances. Responsibilities include hearing preparation; tracking filing deadlines for dozens of cases; and drafting briefs and client communications.
- Represent tenants in purported class action against management company and owner, including investigating building conditions; developing legal strategy; and drafting complaint, briefs, and consent agreement.
- Draft briefs, conduct legal research, and co-author blog posts on a variety of other issues including product liability, asset forfeiture, and securities law.

**Corporation Counsel of the City of New York** (Pro Bono Secondment from Proskauer)
*Special Assistant Corporation Counsel*, General Litigation Division, February-June 2021

- Represented New York City, City agencies, and individual City employees in appeals of Freedom of Information Law requests, disability discrimination claims brought by inmates under Section 1983, and access to a "free appropriate public education" under the Individuals with Disabilities Act.
- Wrote answers, memoranda in support of answers and motions to dismiss, and other documents submitted to the court; conducted legal research on multiple ongoing matters; and participated in federal court hearings.

**Hon. Nicholas G. Garaufis, Eastern District of New York**, Brooklyn, NY
*Judicial Intern*, Summer 2018

**American Civil Liberties Union**, New York, NY
*Paralegal,* National Security Project, September 2016-August 2017

**Cleary Gottlieb Steen & Hamilton LLP**, New York, NY
*Litigation Paralegal*, June 2014-July 2016

## COMMUNITY SERVICE:

Election Protection, *Volunteer*, 2020; SEO Scholars, *Mentor*, 2016-2017; World Wide Opportunities on Organic Farms, *Volunteer*, August 2016

## BAR ADMISSIONS

New York (May 2021)

# THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

JD

OFFICIAL NAME: GORDON, AMY
PREFERRED NAME: Gordon, Amy

ADMIT: 08-30-2017
DEG: JD 05-23-2020

TOTAL HOURS CREDIT: 86.00
CUMULATIVE GPA: 3.43

| | | | | | | |
|---|---|---|---|---|---|---|
| FAL 2017 | 431 | PROPERTY | | 4.0 | B+ | LEB |
| | 421 | CONTRACTS | | 4.0 | B | JCD |
| | 332R | LEGAL ANALYSIS AND COMM | | 3.0 | A- | LRE |
| | 533 | CIVIL PROCEDURE | | 5.0 | B+ | AMD |
| SPR 2018 | 434 | CONSTITUTIONAL LAW I | | 4.0 | B+ | R A |
| | 423 | CRIMINAL LAW I | | 4.0 | A- | JEL |
| | 427 | TORTS | | 4.0 | B+ | DWR |
| | 232S | PERSUASIVE WRTG AND ADV | | 2.0 | A- | EMY |
| FAL 2018 | 483 | EVIDENCE | | 4.0 | B+ | GBS |
| | 379M | CYBERSECURITY TECH/LAW/ | | 3.0 | A- | MAT |
| | 370M | CRIM PROCEDURE: PROSECU | | 3.0 | B+ | JEL |
| | 378R | CAPITAL PUNISHMENT | | 3.0 | B+ | JM |
| SPR 2019 | 697C | CLIN PROG: JUVENILE JUS | P/F | 6.0 | CR | PJS |
| | 474K | BUSINESS ASSOCIATIONS | | 4.0 | B+ | DSS |
| | 486 | FEDERAL COURTS | | 4.0 | B+ | SIV |
| | 179P | INTNL LAW OF CYBER CONF | P/F | 1.0 | CR | MNS |
| FAL 2019 | 397S | SMNR: MILITARY JUSTICE | | 3.0 | A | SIV |
| | 346K | NEGOTIATION | | 3.0 | A- | ADJ |
| | 361 | ADMINISTRATIVE LAW | | 3.0 | A- | JMG |
| | 385 | PROFESSIONAL RESPONSIBI | | 3.0 | B+ | FSM |
| | 272P | FINANCIAL MTHDS FOR LAW | P/F | 2.0 | CR | SCM |
| SPR 2020 | 379M | RESTORATIVE JUSTICE | P/F | 3.0 | CR | MA |
| | 279M | PRIVACY LAW: PERSNL DAT | P/F | 2.0 | CR | BWH |
| | 379M | INTERNET/TELECOM REGULA | P/F | 3.0 | CR | JEC |
| | 279M | INTL ARBITRATN: PRACTCL | P/F | 2.0 | CR | MSG |
| | 397S | SMNR: CYBERSECURITY/ISS | P/F | 3.0 | CR | ADJ |
| | 179P | NARRATION/PROB SOLVING | P/F | 1.0 | CR | ADJ |

| | HOURS ATTEMPT | HOURS PASSED | EXCLUDE P/F | SEM AVG |
|---|---|---|---|---|
| FAL 2017 | 16.00 | 16.00 | 16.00 | 3.30 |
| SPR 2018 | 30.00 | 30.00 | 30.00 | 3.47 |
| FAL 2018 | 43.00 | 43.00 | 43.00 | 3.39 |
| SPR 2019 | 58.00 | 58.00 | 51.00 | 3.30 |
| FAL 2019 | 72.00 | 72.00 | 63.00 | 3.68 |
| SPR 2020 | 86.00 | 86.00 | 63.00 | 0.00 |

+ All Law School courses were graded on the pass/fail basis in Spring 2020 due to the COVID-19 public health crisis.

02-10-2021

May 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Amy Gordon has asked me to update a letter I wrote in June 2019 to support her most recent clerkship applications. I enthusiastically recommend her to you.

Amy was a first year law student in the small section of my Federal Civil Procedure class in Fall 2017, but I know her best because she also was one of my research assistants when she was in law school. Amy helped me with a book project about the American middle class and I can attest to both her research, and writing and editing skills.

As an employee, Amy was hardworking, reliable, and always made sure she told me when she would complete a project or if she was going to need an extension of the deadline she previously gave me. She is a gifted writer and a skilled editor as well. Amy edited one of the early chapters in the book and made it measurably better. Her attention to detail was impeccable – she corrected typographical errors I had missed and she noted where my argument was inconsistent or incomplete. When appropriate, she also drafted and provided substitute language to better explain a point that seemed to her to be unclear.

The most recent assignment she completed for me in May 2019 was a 9 page (single-spaced) heavily-cited (more than 60 footnotes) memo about the 2016 presidential election. To complete that paper, Amy had to sort, read, digest, and then discuss over 50 articles I had assembled over the past 3 years about the election and the middle class. Amy was an excellent, clear and persuasive writer. Moreover, because she had already edited the earlier chapter in the book, she wrote this memo in a way that made it easy for me to seamlessly incorporate parts of her memo into various upcoming chapters of my book.

As a student, Amy was delightful, inquisitive, and passionate in her desire to protect the rights of people who have been ill served by the criminal or juvenile justice systems. Her resume suggests that she has continued the passion for helping people who are underserved by the legal profession. She will be a fantastic member of any judicial chambers. I recommend Amy Gordon to you with no reservations and would be happy to discuss her in more detail if you would like.

Respectfully,

A. Mechele Dickerson

Arthur L. Moller Chair in Bankruptcy Law and Practice
University Distinguished Teaching Professor
The University of Texas School of Law

Mechele Dickerson - mdickerson@law.utexas.edu - 512-232-1311

Proskauer Proskauer Rose LLP Eleven Times Square New York, NY 10036-

January 24, 2023

Seetha Ramachandran
Member of the Firm
d +1.212.969.3455
f 212.969.2900
SRamachandran@proskaue
www.prosk

Re: Amy Gordon

Your Honor:

I am writing to recommend Amy Gordon for a l

I have had the pleasure of working with Amy spring of 2021 (following a public interest sec incoming class of first year associates). We w working from home. Even in a remote environmen interaction with partners, I immediately recogn sophisticated thinker. After returning to the associate for the most challenging matters in m

For example, in a matter where I served as f Amy helped me with a brief in support of a moti warrant where the restraint impinged on our cli number of novel issues in an area where there i we did not serve as primary trial counsel, it w to the motion. Amy did a spectacular job worki between our circuit (the Ninth Circuit) and oth possible. I remember being shocked that someon was able to circulate her draft to the broader

Amy has also worked on a number of difficult functions at a level far above her class year. apart from so many other associates is the way questions and formulate advice for the client. analyzes the issue in light of the rule, factua considerations. She has a great sense of how t reader to understand and digest, and highly usa project where she annotated the Iran sanctions where the client could easily see where the tro discussion. Many of these sanctions projects h Russia's invasion of Ukraine. I know Amy is al always manages to find time and do a great job. matters to drift to the bottom of the pile when

Proskauer



Amy is also an enthusiastic contributor to b curious and always interested in learning new t people – whether they are partners or her own p

I greatly enjoy working with Amy and I think Please fceoenltmafcrtiefe ytoou have any questions.

Respectfully,

Seetha Ramachandran

May 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I have been a supervisor with the New York City Law Department (Office of the Corporation Counsel) for over twenty years. I write to strongly support Amy Gordon's application for a judicial clerkship. While employed by Proskauer Rose LLP, Ms. Gordon worked as a Pro Bono Secondment to the Law Department from February 1, 2021 until June 30, 2021, during which time she was assigned to work under my supervision.

During her time at the Law Department, Ms. Gordon worked on two matters directly under my supervision (and was supervised by another person on other matters). On one matter, Ms. Gordon assisted in handling a complex proceeding brought under New York's Freedom of Information Law ("FOIL") by a zealous petitioner represented by an aggressive attorney. Ms. Gordon conducted all the factual research necessary to respond to the 84-paragraph Petition (including having direct contact with the client), conducted research to support her client's defense, and prepared a well-researched, detailed, and organized memorandum of law and client affidavit in support. As a result of Ms. Gordon's work, we were able to confidently settle on terms favorable to the City.

Ms. Gordon also handled a second FOIL matter for me, commenced against a local community board, in which the petitioner sought a video recording that allegedly evidenced some wrongdoing by one of the community board members. Although initially told that the requested video did not exist, Ms. Gordon doggedly pursued her investigation with the client and traced the complicated provenance of the recording, ultimately learning that the video did, in fact, exist, and where it could be located. Again, Ms. Gordon prepared the papers necessary to respond to the Petition, with only moderate editing required, and again leading to a successful outcome.

I am very impressed with Ms. Gordon's work and believe she is well-suited for a judicial clerkship. Although she was only a first-year associate at the time she worked at the Law Department, Ms. Gordon capably handled complex work and unexpected complications in her cases with poise and excellent judgment. She analyzed the issues, asked pertinent and thoughtful questions, followed up appropriately, and readily understood unfamiliar areas of law and her clients' work. Ms. Gordon also was able work independently, formulating and pursuing potential legal arguments not previously considered.

It bears noting that Ms. Gordon performed her work during the time the Law Department's offices remained closed due to the COVID-19 pandemic and City employees were working from home. Despite the lack of in-person contact, Ms. Gordon maintained an upbeat and friendly attitude, which made her a pleasure to work with, despite difficult times.

It is for all these reasons that I highly recommend Ms. Gordon, and I am confident that she will make an excellent clerk. Please do not hesitate to contact me if you would like to discuss Ms. Gordon's work or if you have any questions.

Respectfully,

/s/ Jeffrey S. Dantowitz

Jeffrey S. Dantowitz
Assistant Corporation Counsel

Jeffrey Dantowitz - JDantowi@law.nyc.gov - 212-356-0876

# Amy Gordon

amygordon@utexas.edu | 646-707-9757 | 643 Carlton Avenue, Apt. 5, Brooklyn, NY 11238


This writing sample is excerpted from an unedited draft of "Material Support for Terrorism: Triable by Military Commission?," a paper I wrote for my fall 2019 seminar on "Military Justice and Jurisdiction" at The University of Texas School of Law. In this paper, I examine the types of offenses triable by "law of war" military commissions and assess whether material support cases fall within their jurisdiction.

I have modified the original paper for this excerpt. In its complete form: Section I introduces the topic. Section II outlines the types of military commissions that have been authorized to operate outside of the parameters of Article III. Section III summarizes how the Supreme Court and D.C. Circuit have determined what types of offenses are triable by "law of war" commissions. Section IV analyzes whether material support falls into this category. Section V concludes by examining the effectiveness of the current commissions at Guantánamo and the value of expanding their jurisdiction. For the purpose of this excerpt, I have omitted sections III.A and III.B examining the Supreme Court's decisions in *Ex parte Quirin*, *In re Yamashita*, and *Hamdan v. Rumsfeld*. I have also omitted sections IV.A and IV.B discussing whether material support is either an international-law-of-war offense or an offense that has historically been tried by U.S. military commissions, ultimately concluding that it is neither. The sections have not been renumbered, but footnotes have.

**Material Support for Terrorism: Triable by Military Commission?**
*Defining the Limits of the Article III Exception*

## I. Introduction

The Military Commissions at Guantánamo Bay created by the George W. Bush administration in the wake of the September 11, 2001 terrorist attacks remain open to this day, almost two decades later. While no new detainees have been brought to Guantánamo since the Bush administration, likely due to the great inefficiencies and controversies associated with it, in 2018, President Trump reversed the Obama Administration's decision to close the facility.[1] His Executive Order stated that the "United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation."[2]

Military commissions have historically been allowed as an exception to the federal courts governed by Article III of the Constitution to prosecute enemy combatants for offenses against the law of war.[3] However, it is an open question whether the military commissions that remain at Guantánamo, which were established under the law of war, can try individuals for crimes that are not violations of the law of war—at least as that term is defined by international tribunals.[4] Material support for terrorism is one such crime that the Executive Branch has attempted to try

[1] *See* James A. Baker & Laura Dickinson, *The Future of the US Military Commissions: Legal and Policy Issues*, JUST SECURITY (May 8, 2018), https://www.justsecurity.org/55865/future-u-s-military-commissions-legal-policy-issues/.
[2] Presidential Executive Order on Protecting America Through Lawful Detention of Terrorists (Jan. 30, 2018), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-protecting-america-lawful-detention-terrorists/.
[3] Al Bahlul v. United States, 840 F.3d 757, 759 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017) [hereinafter "*Al Bahlul III*"].
[4] Alexis Blane, *How the Trump Administration Deals with Detainees Can Provide Insight Into its Counterterrorism Policies*, JUST SECURITY (Nov. 14, 2017), https://www.justsecurity.org/47090/trump-administration-deals-detainees-provide-insight-counterterrorism-priorities/.

by military commission, and according to Congressional statute, it is a crime triable by these commissions.[5]

> Providing material support or resources for terrorism can take the following forms:
>
> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[6]

As is apparent from this long list, the definition of this offense criminalizes a wide range of otherwise lawful activities, associations, and speech, many of which are protected by the First Amendment,[7] making the expansion of military jurisdiction over this offense especially controversial.

Material support for terrorism is a crime that is relatively new to our justice system. It is "on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur."[8] The United States enacted its first "material support" statute in 1994, after the 1993 bombing of the World Trade Center.[9] It gained increasing popularity in the wake of the September 11 terrorist attacks. In 2006, material support made its way into the Military Commissions Act ("MCA"), an Act of Congress, the purpose of which was to "authorize trial by military commission for violations of the law of war."[10] In fact, it became

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[5] *See* 10 U.S.C.A. § 950t(25)(A) ("Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism…or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism…shall be punished as a military commission…").
[6] 18 U.S.C.A. § 2339A(b).
[7] Holder v. Humanitarian Law Project, 561 U.S. 1, 55 (2010) (Breyer, J., dissenting).
[8] *Id.* at 35.
[9] *Aiding Terrorists – An Examination of the Material Support Statute*: *Hearing Before the United States Senate Committee on the Judiciary*, 108th Cong. 2 (2004) (statement of Robert Chesney), https://www.judiciary.senate.gov/imo/media/doc/Chesney%20Testimony%20050504.pdf.
[10] Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat 2600.

"the Justice Department's most popular charge" in domestic antiterrorism cases tried in Article III courts,[11] as well as one of the most popular charges in cases against "enemy combatants" who were to be tried by military commission at Guantánamo.[12] Its widespread use has been viewed as the direct application of the "Bush Doctrine" to "make no distinction between terrorists and those who knowingly harbor or provide aid to them."[13] However, it has been criticized as making "guilt by association the linchpin of the war's strategy."[14]

By listing material support as a crime triable by military commission in the MCA, Congress indicated that material support for terrorism was a law-of-war offense. And it reaffirmed that decision in 2009.[15] However, the modern law of war and the international criminal tribunals that regularly apply those laws have not recognized material support for terrorism as a war crime.[16]

To this day, the military commissions have only attempted to charge individuals for material support based on conduct that occurred before the 2006 passage of the MCA, which was the first time Congress had explicitly authorized military commissions to try material support charges. The United States Court of Appeals for the District of Columbia Circuit has held that these pre-2006 prosecutions for material support violate the Constitution's Ex Post Facto Clause because at the time the conduct occurred material support was not a violation of the law of war.[17]

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[11] DAVID COLE & JAMES DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 211 (2006).
[12] *See The Guantánamo Trials*, Human Rights Watch (last updated Aug. 9, 2018), https://www.hrw.org/Guantánamo-trials.
[13] Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1, 73 & n.25 (2013) (quoting National Security Council: The National Security Strategy of the United States of America 12 (2006)).
[14] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003).
[15] Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2190, 2574–614 (codified at 10 U.S.C. ch. 47A (2012)).
[16] Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 727 (2014).
[17] Al Bahlul v. United States, 767 F.3d 1, 29 (D.C. Cir. 2014) (en banc) [hereinafter "*Al Bahlul I*"].

Now it is necessary to determine whether it is constitutional for enemy combatants to be charged in military commissions for material support based on conduct *following* the enactment of that law. If the answer is no, there should be some discernible limit on the types of post-2006 offenses triable by military commissions, thereby reserving primary jurisdiction over most offenses to Article III courts. However, if the answer is yes, it will be difficult to argue that any such limit exists.

In answering this question, I will: outline the types of military commissions that have been authorized to operate outside of the parameters of Article III; summarize how the Supreme Court and D.C. Circuit have determined what types of offenses are triable by "law of war" commissions; analyze whether material support falls into this category; and conclude by examining the effectiveness of the current commissions at Guantánamo and the value of expanding their jurisdiction. Determining the constitutional limits of military power "is especially critical as our nation enters a new era in which many of the traditional constraints on the political branches' authority to prosecute individuals in military commissions—including wars' temporal limits and the presence of clearly defined enemies—are dissipating."[18]

**II. The Article III Exception for Military Commissions**

Military commissions have traditionally been upheld as a very narrow exception to Article III and used to accomplish "specific and discrete objectives."[19] Historically, military commissions were *ad hoc*, irregular courts deployed in three situations: First, military commissions served as courts of general jurisdiction, meaning that they could try ordinary

[18] *Al Bahlul III*, 840 F.3d 757, 807 (D.C. Cir. 2016) (en banc) (Rogers, J., dissenting), cert. denied, 138 S. Ct. 313 (2017).
[19] *Al Bahlul I*, 767 F.3d at 50 (Rogers, J., concurring in part).

civilian offenses such as manslaughter or robbery as well as violations of military orders committed by both soldiers and civilians, in areas under U.S. military occupation.[20] Second, military commissions served as courts of general jurisdiction in areas subject to martial law, "as much of our country was during the Civil War."[21] Third, military commissions provided a forum for the prosecution of enemy belligerents for offenses against the law of war (known as "law-of-war" commissions).[22]

At issue today is this third usage, which is the most controversial because it establishes the commissions as an alternative to available civilian courts. In *Ex parte Quirin*, a World War II case, the Supreme Court upheld this third type of commission as a "narrow, atextual exception to Article III."[23] However, following September 11, the government has pushed for a broader understanding of this exception to cover a wider variety of offenses, including material support.

As mentioned earlier, to date, military commissions have only attempted to charge individuals for material support based on conduct that occurred before the 2006 enactment of the MCA. Therefore, the question presented to the court in these cases has been whether the prosecutions violated the Ex Post Facto Clause of the Constitution. In answering this question, the court has had to determine whether material support was triable by military commission before the enactment of the MCA, at which point Article 21 of the UCMJ controlled jurisdiction. Article 21 was interpreted by the *Quirin* Court as authorizing military commission jurisdiction over "offenses committed by enemy belligerents against the law of war."[24]

[20] *Id.* at 7.
[21] *Id.*
[22] *Id.*
[23] *Al Bahlul III*, 840 F.3d at 804–05 (Rogers, J., dissenting).
[24] Ex parte Quirin, 317 U.S. 1, 41 (1942).

As will be discussed below, while the Court's holding was in part statutory, it was also constitutional because the Court held that Article III jury-trial rights did not apply to "offenses committed by enemy belligerents against the law of war." Thus, as of now, according to the Supreme Court, the constitutional limits of the military commissions' authority to try certain offenses including material support is determined by how the Court defines offenses against the law of war.

## III. Court Decisions Regarding the Jurisdiction of Law-of-War Commissions

*A. Ex parte Quirin and the Beginnings of Law-of-War Commissions*

*B. Post-September 11 Military Commissions*

*C. Al Bahlul and Domestic Law-of-War Offenses*

In 2014, the D.C. Circuit addressed the constitutionality of trying material support by military commission, in *Al Bahlul v. United States* ("*Al Bahlul I*").[25] Al Bahlul was Osama bin Laden's personal assistant, led al Qaeda's propaganda operation, and assisted with preparations for the September 11 terrorist attacks.[26] He was convicted of conspiracy, material support, and solicitation pursuant to the 2006 MCA.[27] In assessing whether it was constitutional to try such non-international offenses via commission, the court focused its analysis on whether doing so would be a violation of the Ex Post Facto Clause because the charges were based on conduct that occurred pre-2006. [28] The D.C. Circuit unanimously held that it was unconstitutional for military commissions to try material support and solicitation for conduct occurring before the 2006

[25] 767 F.3d 1 (D.C. Cir. 2014) (en banc).
[26] *Id.* at 6.
[27] *Id.* at 5.
[28] *See id.* at 17.

enactment of the MCA because not only were they not international law-of-war offenses but they also were not historically tried by U.S. military commissions (the reasoning will be discussed in more detail in sections IV.A and IV.B).[29] Notably, the court did not decide whether it would be constitutional to bring material support charges for conduct occurring post-2006. A majority upheld Al Bahlul's conspiracy conviction on the grounds that it was not a violation of the Ex Post Facto Clause because of somewhat more equivocal historical evidence regarding conspiracy as an offense triable by commission,[30] a finding which the Court will return to, two years later.

In 2016, then-Judge and now-Justice Kavanaugh, authored a concurring opinion on behalf of himself and two other D.C. Circuit judges, in *Al Bahlul v. United States* ("*Al Bahlul III*").[31] In that decision, he held that "law of war" as it pertains to the Article III jury-trial exception announced in *Quirin* did not only include international law-of-war offenses, but also domestic law-of-war offenses that have *historically been tried by U.S. military commission*.[32] Specifically, Kavanaugh ruled that Al Bahlul's conspiracy conviction did not violate Article III because according to historical precedent, enemy belligerents who commit this offense do not have a constitutional right to a jury trial.[33] In effect, this means that Article III is *not* a barrier to U.S. military commission trials of at least *some* non-international-law-of-war offenses.[34]

Kavanaugh also hinted, but did not say conclusively, that he might read the exception to Article III even more broadly as to permit commissions to punish *any* offense that Article I

[29] *Id.* at 27–31.
[30] *Id.* at 26–27.
[31] 840 F.3d 757 (D.C. Cir. 2016) (en banc), cert. denied, 138 S. Ct. 313 (2017).
[32] First, because at the founding era, the Continental Congress made spying an offense which was and has never been an offense under international law of war, triable by military commission, the Constitution does not bar military commission trials of domestic offenses. Second, exceptions to Article III are "established and interpreted" in light of historical practice, and the historical practice of "trying non-international-law-of-war offenses is extensive and dates from the beginning of the Republic." *Id.* at 769-770 (Kavanaugh, J., concurring).
[33] *Id.* at 768–70 (Kavanaugh, J., concurring).
[34] *Id.* at 769 (Kavanaugh, J., concurring).

authorized Congress to try by commission, even when Article III courts remain open.[35] And according to Kavanaugh Article I authorizes Congress to try both international and at least some domestic law-of-war offenses by military commission.[36] Because the court was dealing with a pre-2006 offense, Kavanaugh did not have to decisively say,[37] but does note that there is language in *Quirin* that suggests this broad reading.[38]

[…]

It is still to be determined whether the Supreme Court will accept Kavanaugh's expansive law-of-war theory, because the Supreme Court denied cert in *Al Bahlul III*. However, for purposes of this paper, I will take up the three categories of offenses that, according to Kavanaugh, Article III would permit a military commission to punish, and assess whether material support falls into any of them. The categories are: (1) international law-of-war crimes, (2) offenses that have historically been tried by U.S. military commissions, (3) and possibly any offense that Article I authorizes Congress to assign to military commission jurisdiction.

**IV. Is Material Support Triable by Law-of-War Commissions?**

*A. War Crime Under International Law?*

*B. Offense Historically Tried by U.S. Military Commissions?*

[…]

[35] *Id.* at 771 (Kavanaugh, J., concurring).
[36] *Id.* at 761–68 (Kavanaugh, J., concurring).
[37] *Id.* at 771 (Kavanaugh, J., concurring) ("we need not answer that hypothetical in this case and need not define with precision the outer limits of the Constitution in this context, other than to say that international law is not such a limit").
[38] *Quirin* stated that Article III does "not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission," and does not bar "the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war. *Id.* at 770–71 (Kavanaugh, J., concurring) (quoting Ex parte Quirin, 317 U.S. 1, 45, 41 (1942)).

There is little justification for using sparse and controversial historical examples to justify trying conspiracy cases by military commission when the underlying acts are nearly identical to those chargeable as material support and thus ineligible for trial by military commission.

*C. Authorized by Article I?*

Article I does not have much to say about the "appropriateness of military versus civilian jurisdiction" so the courts have looked primarily to Article III in determining whether and when to grant exceptions to its jury-trial protections.[39] And since World War II, courts have relied specifically on the *Quirin* Court's holding that Article III jury-trial rights do not apply to "offenses committed by enemy belligerents against the law of war."[40]

However, in Kavanaugh's *Al Bahlul III* concurring opinion, holding that international law does not limit our ability to grant military commission jurisdiction over additional offenses, he suggests that Article III might permit the full extent of what Article I authorizes. This view has yet to be accepted—or rejected by a majority of the D.C. Circuit or the Supreme Court. Given that Congress has already categorized material support as an offense triable by military commission, if the Supreme Court were to accept Kavanaugh's view, it is quite likely that the Congressional determination would be upheld, depending on your view of what Article I authorizes.

Some argue that the Define and Punish Clause supplies the Article I basis for military commissions. The origins of this argument are found in the Court's opinion in *Quirin*, which states that:

> Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against *the law of*

[39] *See* Stephen I. Vladeck, *The Laws of War As A Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295, 336 (2010).
[40] Ex parte Quirin, 317 U.S. 1, 41 (1942).

> *nations* by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts *of the law of nations, and more particularly the law of war*, are cognizable by such tribunals.[41]

The *Al Bahlul III* dissenters, scholars, and arguably the Supreme Court in *Yamashita* and *Hamdan*, have all interpreted this language to mean that the power to provide authorization of the trial of offenses against the laws of war by military commission derives solely from the Law of Nations Clause.[42] The *Al Bahlul III* dissenters take this to mean that international law defines the limits on what Congress can authorize the military commissions to try.[43]

However, Kavanaugh asserts that Congress can use authorities other than the Define and Punish Clause to codify "domestic" war crimes triable by military commission.[44] Specifically, he points to Congress's war powers under Article I, Section 8 to "declare war" and "make rules concerning capture on land and water."[45] These clauses give Congress expansive authority to create military commissions because unlike the Define and Punish Clause, they do not "impose international law as a constraint on Congress's authority to make offenses triable by military commission."[46]

Kavanaugh views military commissions as not merely a preventive measure but as "an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war."[47] If that view is codified by the

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[41] *Id.* at 28 (emphasis added).
[42] *Al Bahlul III*, 840 F.3d 757, 818–19 (D.C. Cir. 2016) (en banc) (Roger, J., dissenting), cert. denied, 138 S. Ct. 313 (2017); Vladeck, *supra* note 39, at 317; In re Yamashita, 327 U.S. 1, 7 (1946); Hamdan v. Rumsfeld, 548 U.S. 557, 601–02, (2006); *see also* Martin S. Lederman*, The Law(?) of the Lincoln Assassination*, 118 Colum. L. Rev. 323, n.294 (2018).
[43] *Al Bahlul III*, 840 F.3d at 819 (Rogers, J., dissenting) ("Thus, even were we to determine the scope of the Article III exception by reference to Congress's Article I powers, it would still be constrained by international law.").
[44] *Id.* at 760–61 (Kavanaugh, J., concurring).
[45] *Id.* at 761(Kavanaugh, J., concurring).
[46] *Id.* (Kavanaugh, J., concurring).
[47] *Id.* at 761–62 (Kavanaugh, J., concurring) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920)).

Supreme Court, it is very likely that material support may be triable by commissions because not only has Congress explicitly authorized this, but since September 11, the prosecution of inchoate crimes has become a key tool in U.S. counterterrorism efforts. As noted above, the "Bush Doctrine" made no distinction between "terrorists and those who knowingly harbor or provide aid to them."[48]

Scholars and judges have continuously emphasized that exceptions to Article III should be "strictly construed."[49] Therefore, Kavanaugh's suggested analysis would pave the way for a dramatic shift in the balance of powers because it would greatly expand the "law of war" exception to Article III arguably beyond what the *Quirin* Court envisioned.

**V. Constitutional or Not, Why Expand the Jurisdiction of the Military Commissions?**

Military commissions have been used as an alternative to Article III civilian courts because they are not subject to the same constraints or to "the vagaries of a civilian jury," and are therefore "more likely to dispense swift and severe sentences."[50] President Roosevelt ordered military commissions to try the Nazi saboteurs for those precise reasons.[51] Similarly, President Bush established the commissions at Guantánamo to "swiftly" try terrorism suspects in the wake of September 11.[52] Commissions have also been used to "incapacitate the enemy, and to deter future violations of the law of war, so as to more effectively and successfully prosecute the

[48] Hollywood, *supra* note 13, at 73.
[49] Vladeck, *supra* note 39, at 338; s*ee also* Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1679–80 (2017); *Al Bahlul III*, 840 F.3d at 813 (Rogers, J., dissenting).
[50] Lederman, *Of Spies, supra* note 49, at 1552.
[51] *See* Carlos M. Vázquez, *"Not a Happy Precedent": The Story of* Ex Parte Quirin, *in* FEDERAL COURTS STORIES 224–25, 246 (Judith Resnik & Vicki C. Jackson eds., 2009).
[52] Aisha I. Saad & Zoe A. Y. Weinberg, Opinion, *Remember Guantánamo*, N.Y. TIMES, (Mar. 15, 2018), https://nyti.ms/2FMGwIO.

conflict itself."[53] While if done right this might be helpful in achieving a military victory, as discussed above, "it is in deep tension with the purposes of Article III's guarantees."[54]

Furthermore, these ostensible purposes have not actually been realized. The post-September 11 commissions have been exceedingly prolonged and rife with inefficiencies and have certainly not succeeded in dispensing anything close to swift justice. Established nearly two decades ago, these commissions remain open as the cases have "languish[ed] for years in pretrial proceedings."[55] It took eighteen years for a judge to just *set* a date for the trial of the men accused of plotting the September 11 terrorist attacks.[56] Over the course of these years, about 780 detainees have been held at Guantánamo, but the commissions have issued only eight convictions, and half of those have been either overturned or partly invalidated.[57]

The operations at Guantánamo, especially the use of "enhanced interrogation techniques," have actually been counterproductive to the goal of swift justice. They have caused long delays in trials because of arguments regarding the admissibility of testimony obtained through the use of these techniques.[58] It has also been argued that prosecuting terror suspects before military commissions makes them look like "warriors" rather than criminals, in which case the commissions do little to deter future terrorist activity.[59]

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[53] Lederman, *Of Spies*, *supra* note 49, at 1553; *see also* Remarks on Signing the Military Commissions Act of 2006, 2 Pub. Papers 1857 (Oct. 17, 2006).
[54] Lederman, *Of Spies*, supra note 49, at 1553.
[55] Saad & Weinberg, *supra* note 52.
[56] Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks Is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), https://nyti.ms/34chr6T.
[57] Saad & Weinberg, *supra* note 52.
[58] Carol Rosenberg, *Sept. 11 Trial Judge Faults Secrecy in Guantánamo Prison Commander's Testimony*, N.Y. TIMES (Dec. 26, 2019), https://nyti.ms/39jIb8b ("Defense lawyers argue that any confessions the men made were tainted by torture"); *see also* Rosenberg, *supra* note 56.
[59] *Myth v. Fact: Trying Terror Suspects in Federal Courts*, HUMAN RIGHTS FIRST (Feb. 14, 2018), https://www.humanrightsfirst.org/resource/myth-v-fact-trying-terror-suspects-federal-courts.

Already the use of the commissions has weakened America's human-rights record, and impeded joint counter-terrorism efforts with allies.[60] And by using commissions to punish individuals for material support and other crimes that only the U.S. considers to be war crimes—or crimes at all, we risk de-legitimatizing these commissions even further in the eyes of the international community.

Moreover, it is completely unnecessary to expand the jurisdiction of military commissions beyond violations of the international law of war. Those who provide material support to terrorism can still be appropriately prosecuted and punished. As Judge Tatel argues, "the government can always fall back on the apparatus it has used to try federal crimes for more than two centuries: the federal courts."[61]

Broadening the scope of military tribunals operating outside of due process and other constitutional protections poses significant threats to fundamental American principles regarding both separation of powers and individual rights and liberties. If more offenses are deemed triable by military commissions, more people will become subject to them at the discretion of the Executive Branch. As we expand the exceptions to the rule, we weaken the rule. In order to avoid undermining the fundamental protections enshrined in Article III, we must carefully define and limit the offenses that may be tried outside of it.

[60] Letter from John F. Kerry, Secretary of State, to Hon. Robert Mendez, Chairman, Committee on Foreign Relations (Nov. 13, 2013), http://www.humanrightsfirst.org/uploads/pdfs/Kerry-GTMO-NDAA-Nov2013.pdf.
[61] Al Bahlul v. United States, 792 F.3d 1, 27 (D.C. Cir. 2015), reh'g en banc granted, judgment vacated (Sept. 25, 2015), Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016) (Tatel, J., concurring).

## Applicant Details

| | |
|---|---|
| First Name | **Amanda** |
| Middle Initial | **J** |
| Last Name | **Harkavy** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **amanda.harkavy@gmail.com** |
| Address | **Address**<br>Street<br>**128 E 65TH ST, Apt 4**<br>City<br>**New York**<br>State/Territory<br>**New York**<br>Zip<br>**10065-7037**<br>Country<br>**United States** |
| Contact Phone Number | **7815919909** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Dartmouth College** |
| Date of BA/BS | **June 2017** |
| JD/LLB From | **New York University School of Law**<br>**https://www.law.nyu.edu** |
| Date of JD/LLB | **May 18, 2022** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Annual Survey of American Law** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/Externships | **No** |

| | |
|---|---|
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Chirba, MaryAnn
maryann.chirba@bc.edu
781-697-2233
Porpora, Matthew
porporam@sullcrom.com
(212) 558-4028
Wechsler, Rachel
rachel.wechsler@missouri.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Amanda Harkavy
128 East 65th Street, Apt. 4
New York, NY, 10065

June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to apply for a clerkship in your chambers for the 2025 term. I graduated from New York University School of Law in 2022 and am currently an associate in Sullivan & Cromwell LLP's Litigation Group.

Please find enclosed my resume, law school transcript, and writing sample. The following individuals will be submitting letters of recommendation on my behalf:

- Professor Mary Ann Chirba, maryann.chirba@bc.edu, 617-552-4381
- Dr. Rachel Wechsler, rachel.wechsler@missouri.edu, 573-884-3614
- Matthew J. Porpora, porporam@sullcrom.com, 212-558-4028

Please let me know if I can provide any additional information. I can be reached by phone at 781-591-9909 or by email at amanda.harkavy@gmail.com. Thank you for considering my application.

Respectfully,

*/s/ Amanda Harkavy*
Amanda Harkavy

**AMANDA HARKAVY**
128 East 65th Street, Apt. 4
New York, NY 10065
(781) 591-9909 • amanda.harkavy@gmail.com

## EDUCATION

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
J.D., May 2022
Honors: *Annual Survey of American Law*, Articles Editor
Activities: Government Civil Litigation Externship with the U.S. Attorney's Office – SDNY
Supreme Court Forum, Vice President for Operations

**DARTMOUTH COLLEGE**, Hanover, NH
B.A. in English (Government Minor), *cum laude*, June 2017
Cumulative GPA: 3.79/4.00 | Major GPA: 3.98/4.00
Honors: Nelson A. Rockefeller Center for Public Policy First-Year Fellow
Activities: *Mouth Magazine*, Senior Editor; The Movement Against Violence, Student Facilitator
Study Abroad: King's College, London, UK, September – December 2015

## EXPERIENCE

**SULLIVAN & CROMWELL LLP**, New York, NY
***Associate***, September 2022 – Present; ***Summer Associate***, Summer 2021
Participated in all aspects of complex commercial litigation, including a civil fraud and unfair competition matter involving major automobile manufacturers. Responded to Department of Justice inquiry into a nonprofit organization as part of a *pro bono* matter. Drafted article about shareholder activism in the utility sector. Performed due diligence and drafted portions of agreement for M&A transactions. Participated in the Anti-Defamation League's Summer Associate Research Program.

**NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL**, New York, NY
***Public Service Fellow (Health Care Bureau)***, July – August 2020
Conducted legal research in support of the Health Care Bureau's opioid litigation. Drafted witness summaries to help prepare for trial. Researched and wrote a memorandum assessing a potential deceptive practice case.

**VANTAGE PARTNERS**, Boston, MA
***Management Consulting Analyst***, August 2017 – July 2019
Served as project manager on case teams. Researched business challenges and developed recommendations for clients across healthcare, life sciences, and financial services sectors, leveraging firm's expertise in negotiation and strategic partnerships.

**THE U.S. DEPARTMENT OF JUSTICE**, Washington, D.C.
***Speechwriting Intern***, January – March 2016
Nelson A. Rockefeller Center for Public Policy Grant Recipient. Drafted and edited formal remarks, letters, and press release quotations for Attorney General Loretta Lynch.

## ADDITIONAL INFORMATION

Admitted to New York State Bar. Enjoy tennis, dancing, running, and golden retrievers.

**Name:** **Amanda J Harkavy**
**Print Date:** **02/13/2023**
**Student ID:** **N13453941**
**Institution ID:** **002785**
**Page:** **1 of 2**

**New York University**
**Beginning of School of Law Record**

**Degrees Awarded**

Juris Doctor 05/18/2022
School of Law
Major: Law

**Fall 2019**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Rachel Wechsler | | | |
| Torts | LAW-LW 11275 | 4.0 | A |
| Instructor: Mark A Geistfeld | | | |
| Procedure | LAW-LW 11650 | 5.0 | B+ |
| Instructor: Samuel Issacharoff | | | |
| Contracts | LAW-LW 11672 | 4.0 | B |
| Instructor: Richard Rexford Wayne Brooks | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Topic: Feminism as Ethical Movement? | | | |
| Instructor: Sarah E Samuels<br>Sarah E Burns<br>Alyson M Zureick | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.5 | 15.5 |
| Cumulative | 15.5 | 15.5 |

**Spring 2020**

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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| | | | |
|---|---|---|---|
| Constitutional Law | LAW-LW 10598 | 4.0 | CR |
| Instructor: Kenji Yoshino | | | |
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Rachel Wechsler | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | CR |
| Instructor: Adam M Samaha | | | |
| Criminal Law | LAW-LW 11147 | 4.0 | CR |
| Instructor: Erin Murphy | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Topic: Feminism as Ethical Movement? | | | |
| Instructor: Sarah E Samuels<br>Sarah E Burns<br>Alyson M Zureick | | | |
| Financial Concepts for Lawyers | LAW-LW 12722 | 0.0 | CR |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2020**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Ethical and Legal Challenges in the Modern Corporation | LAW-LW 10387 | 3.0 | A |
| Instructor: Helen S Scott<br>Karen Brenner | | | |
| Corporations | LAW-LW 10644 | 4.0 | A |
| Instructor: Robert Jackson | | | |
| Government Civil Litigation Externship-Southern District | LAW-LW 11701 | 3.0 | A- |
| Instructor: David Joseph Kennedy<br>Seungkun Kim | | | |
| Government Civil Litigation Externship - Southern District Seminar | LAW-LW 11895 | 2.0 | A- |
| Instructor: David Joseph Kennedy<br>Seungkun Kim | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 12.0 | 12.0 |
| Cumulative | 42.0 | 42.0 |

**Spring 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Federal Health Reform: Law, Policy and Politics Seminar | LAW-LW 11371 | 2.0 | A |
| Instructor: Mary Ann Chirba | | | |
| Professional Responsibility and the Regulation of Lawyers | LAW-LW 11479 | 2.0 | B+ |
| Instructor: Geoffrey P Miller | | | |
| Copyright Law | LAW-LW 11552 | 4.0 | B |
| Instructor: Jeanne C Fromer | | | |
| Evidence | LAW-LW 11607 | 4.0 | B+ |
| Instructor: Daniel J Capra | | | |
| Negotiation | LAW-LW 11642 | 3.0 | A- |
| Instructor: Dina R Jansenson | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.0 | 15.0 |
| Cumulative | 57.0 | 57.0 |

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Art Law | LAW-LW 10122 | 4.0 | A- |
| Instructor: Amy M Adler | | | |
| Survey of Securities Regulation | LAW-LW 10322 | 4.0 | B+ |
| Instructor: Stephen J Choi | | | |
| Property | LAW-LW 11783 | 4.0 | A- |
| Instructor: Daniel Hulsebosch | | | |
| After the 2020 Election: the Paths and Challenges of Political Reform Seminar | LAW-LW 12398 | 2.0 | A- |
| Instructor: Robert Bauer | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 71.0 | 71.0 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Natural Resources Law and Policy | LAW-LW 10028 | 2.0 | A- |
| Instructor: Katrina M Wyman | | | |
| Annual Survey of American Law | LAW-LW 10727 | 1.0 | CR |
| Antitrust & Regulatory Alternatives I | LAW-LW 11348 | 3.0 | A- |
| Instructor: Harry First | | | |
| Corporate Finance | LAW-LW 11461 | 3.0 | A- |
| Instructor: Stanley Siegel | | | |
| Federal Courts and the Federal System | LAW-LW 11722 | 4.0 | B+ |
| Instructor: Helen Hershkoff | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 13.0 | 13.0 |
| Cumulative | 84.0 | 84.0 |

| | |
|---|---|
| **Name:** | **Amanda J Harkavy** |
| **Print Date:** | **02/13/2023** |
| **Student ID:** | **N13453941** |
| **Institution ID:** | **002785** |
| **Page:** | **2 of 2** |

Staff Editor - Annual Survey of American Law 2020-2021
Articles Editor - Annual Survey of American Law 2021-2022
**End of School of Law Record**

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
## JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

The following guidelines represent NYU School of Law's guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

| | | |
|---|---|---|
| **A+** = 0-2% | **A** = 7-13% | **A-** = 16-24% |
| **B+** = 22-30% | **B** = Remainder | **B-** = 0-8% (First-Year JD); 4-11% (All other JD and LLM) |
| **C/D/F** = 0-5% | **CR** = Credit | **IP** = In Progress |
| **EXC** = Excused | **FAB** = Fail/Absence | **FX** = Failure for cheating |
| *** = Grade not yet submitted by faculty member | | |
| Maximum for A tier = 31%; Maximum grades above B = 57% | | |

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

| | |
|---|---|
| ***Pomeroy Scholar***: | Top ten students in the class after two semesters |
| ***Butler Scholar***: | Top ten students in the class after four semesters |
| ***Florence Allen Scholar***: | Top 10% of the class after four semesters |
| ***Robert McKay Scholar***: | Top 25% of the class after four semesters |

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
## JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

**Updated: 9/14/2020**

BOSTON COLLEGE
LAW SCHOOL

Mary Ann Chirba, JD, DSc, MPH
Boston College Law School
885 Centre Street
Newton Centre, MA 02459
maryann.chirba@bc.edu

April 22, 2023

**Re: Amanda Harkavy, J.D. – Application for Judicial Clerkship**

Please accept this letter in support of Amanda Harkavy's application for a judicial clerkship. She is outstanding in every respect, and I recommend her with great enthusiasm.

I first met Amanda in 2021 when she took my course, "Federal Health Reform: Law, Policy and Politics," during her 2L spring semester at NYU School of Law. Her performance was consistently excellent on a variety of individual and small group assignments. For instance, for a "Practice Group" presentation with several classmates, Amanda's strong organizational and time management skills lead her to function as a project manager for her team, ensuring fair allocation and efficient coordination of responsibilities. The result was an engaging and comprehensive evaluation of the first round of COVID vaccines (which the FDA had authorized for emergency use a short three months earlier), including its rapid development through Operation Warp Speed, anticipated risks of vaccine injury and compensation mechanisms, vaccine mandates and newly filed litigation concerning religious exemptions.

Amanda's final assignment for the course was a self-designed research project. Again, it was the spring of 2021. President Biden had just been sworn in, COVID continued to rage, and litigation abounded regarding the Trump administration's efforts to impede women's access to reproductive health care. Against this background, Amanda decided to research historical and ongoing efforts to restrict doctor-patient communications at Title X family planning clinics, which serve low-income patients. Amanda studied five decades of tough political realities, which culminated in the Trump administration's 2019 rule that gagged a medical provider from candidly discussing a pregnant woman's options, even during a miscarriage or high-risk pregnancy. Amanda's analysis integrated complex issues of regulatory process and judicial deference under the Administrative Procedure Act with the financial and legal ramifications of restricting a patient from obtaining basic medical information from her health care provider.

Amanda submitted her final research memo a full year before Justice Alito wrote for the majority in *Dobbs v. Jackson Women's Health Organization*. I was impressed with Amanda's memo in 2021 and I am even more impressed with it now. Amanda constructed a clear and straightforward analysis of a legally complicated and politically contentious issue. She could have lightened her load considerably by choosing a different topic and/or narrowing the scope of her discussion. Instead, Amanda eagerly jumped into the deep end of a difficult dilemma in which a law designed to protect personal and public health was used to impede both. Although it would be another year before *Dobbs'* release, Amanda's thoughtful analysis foreshadowed much of the controversy and legal complexities that now saturate daily headlines and permeate any discussion of women's health.

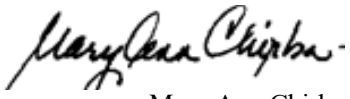
Having had the privilege and pleasure of working closely with Amanda on these and other assignments, I can assure you that she is more than adequately equipped to be an excellent judicial clerk. She is disciplined

and determined. She also knows how (and why!) to research an issue thoroughly, build a robust fund of information, and consider complex problems and competing arguments from all angles and perspectives. As a judicial clerk, she will welcome guidance and direction, but she will also take the initiative and, when needed, play four-dimensional chess.

Amanda's keen intellect and strong work ethic are exceeded only by her warm and engaging personality. In a pressurized and high-stakes work setting, you will be able to trust her to get it right, rely upon her to get it done on time, if not early, and enjoy working with her in the process. For these reasons and more, I recommend Amanda Harkavy most highly and without reservation.

Thank you very much for considering her candidacy.

Sincerely,



Mary Ann Chirba

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Amanda Harkavy for a judicial clerkship. I am a partner at the law firm of Sullivan & Cromwell LLP and have worked regularly with Amanda on a very busy litigation since she joined the firm as an associate last year. Amanda is an incredibly talented and hard-working young lawyer, and I have every confidence that she will be an excellent law clerk if given the opportunity.

Since her start, Amanda has stood out from her peers at the firm, all while displaying a steady yet humble confidence that has earned her praise from other partners and fellow associates. From day one, it has been clear that Amanda is devoted to the practice of law and building her skill set. She becomes an expert in the subject matters at issue in the assignments she handles, she asks intelligent questions and attacks assignments with focus, she seeks out guidance when appropriate and seamlessly incorporates suggestions, and she excels in legal research and drafting.

Equally importantly, Amanda appears genuinely to enjoy the practice of law and learning new areas of it. Her positive attitude and natural calm have a clear impact on those around her. Not surprisingly, she is incredibly well-liked: team members all love working alongside Amanda. I similarly feel lucky to have Amanda on my team, because she does everything well and is a delight to be around.

Amanda had earned opportunities to do work that is more complex than other lawyers of her vintage typically handle. Just by way of example, Amanda has taken a leading role in researching and drafting complicated motion papers, including in support of motions to dismiss and in connection with endless discovery disputes in a highly contentious, “bet-the-company”-type litigation (against an aggressive opponent and well-seasoned opposing counsel). Amanda has excelled in these and other areas.

In sum, Amanda is an impressive lawyer whose career prospects are limitless. I have no doubt that, if given the opportunity, she will be an equally impressive law clerk. I wholeheartedly recommend her for a position in your chambers.

Please feel free to contact me at (212) 558-4028 if you would like any additional information.

Sincerely,

/s/

Matthew J. Porpora

Matthew Porpora - porporam@sullcrom.com - (212) 558-4028

University of Missouri

**School of Law**
820 Conley Ave
Columbia, MO 65211
**PHONE** 573-882-6487
**WEB** law.missouri.edu

May 1, 2023

Re: Clerkship Candidate: Amanda Harkavy

Dear Judge:

I am writing to express my exceptionally strong support of Amanda Harkavy's application to serve as a judicial law clerk in your chambers. Based on my familiarity with Amanda and her work from her time as a student in my year-long Lawyering course (2019-2020), I recommend her enthusiastically and without reservation.

The Lawyering Program is a key part of the first-year JD curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellence in practice. In our Lawyering course, students engage not only in the traditional legal research and writing tasks that most law schools emphasize, but also have an opportunity to work collaboratively and to practice skills typical to most real-world legal practice. Through simulations, discussions, and collaborative critique of their work, students develop skills in the areas of legal writing, client interviewing, counseling, negotiation, mediation, and oral advocacy. Because of the small size of the class (15 students) and the frequency of one-on-one and small-group interactions, I can offer a unique perspective on Amanda's skills, abilities, and strengths.

Amanda's performance in my course was excellent. Throughout the year, she demonstrated her strong work ethic, impressive writing and analytical abilities, positive attitude, and commitment to developing her Lawyering skills. I was impressed with her deep engagement with our simulation work and the critique process from the start. Not only was Amanda very responsive to feedback on her work, but she was also incredibly generous with her comments on her peers' work. The time and care she took to provide her critique partners with detailed and constructive feedback stood out to me and greatly benefitted her peers. Her comments were consistently insightful and reflected her strong grasp of the substance of the Lawyering assignments. This is but one example of Amanda's genuine investment in both self-improvement and in lifting up her peers.

Amanda successfully honed and developed her legal research and writing skills throughout the course, and her work product was always among the best in the class. She ended the Lawyering year on a high note, effectively marshaling authority in support of her arguments in her written brief and during her oral argument addressing First Amendment and criminal statutory issues. She was well-spoken and persuasive during the oral argument, responding thoughtfully to the judge's

challenging questions. Given the excellent quality of Amanda's work, I am confident that she would fully engage with and meet the intellectual demands of a clerkship.

Since graduating from NYU Law, Amanda has continued to develop her Lawyering skills as a litigation associate at Sullivan & Cromwell LLP. She has conducted legal research and written memoranda, motions, and letters on issues related to discovery, privilege, and evidence, among other topics, during her time as an associate and summer associate at S&C. Previously, Amanda completed an externship with the U.S. Attorney's Office for the Southern District of New York, an internship with the New York Attorney General's Office, and the Anti-Defamation League's Summer Research Program. Amanda's diverse legal experiences have prepared her very well for the work of a judicial clerk.

It was genuinely a pleasure to work with Amanda throughout the 2019-2020 academic year. Her deep engagement with the course, intellectual abilities and curiosity, receptiveness to feedback, conscientiousness, professionalism, and consideration towards others made her a joy to teach. I have no doubt that these qualities will also enable Amanda to be a wonderful clerk and make valuable contributions to your chambers. If you have any questions or would like additional information, please do not hesitate to contact me at rachel.wechsler@missouri.edu or at (573) 884-3614. Thank you for your consideration.

Sincerely,

Dr. Rachel Wechsler
Associate Professor
University of Missouri School of Law

**AMANDA HARKAVY**
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# WRITING SAMPLE

I drafted the attached writing sample as an assignment in my first semester Lawyering course. The assignment required drafting a memorandum assessing the strength of a fictional client's potential Title VII claim against her employer. I conducted all of the research necessary for the assignment. My professor, Dr. Rachel Wechsler, provided feedback on the draft in 2019. I revised the draft in 2023.

**MEMORANDUM**

To: Dr. Rachel Wechsler
From: Amanda Harkavy
Date: October 28, 2019
Re: Anya Simo: Title VII Sex Discrimination Research

## QUESTION PRESENTED

Does Anya Simo have a strong sex discrimination claim under Title VII against her employer, Established 1883 Properties, LLC ("1883 Properties"), for failing to promote her to the position of superintendent of 432 Pine Street?

## SHORT ANSWER

Yes, based on her intake interview, Anya Simo has a strong sex discrimination claim against her employer under Title VII. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the United States Supreme Court outlined a burden-shifting framework for Title VII claims. Within this framework, Ms. Simo must first establish a prima facie case of sex discrimination. In the Second Circuit, the prima facie case for a failure-to-promote claim requires a de minimis showing that she is a member of a protected class, that she applied to a position for which she was qualified and for which her employer sought applicants, and that her employer failed to promote her and continued to seek applicants with her qualifications. *Petrosino v. Bell Atl.*, 385 F.3d 210, 226 (2d Cir. 2004). Ms. Simo will allege that Carson Bolder, her boss and the owner of 1883 Properties, failed to promote her to superintendent of 432 Pine Street because of her sex, and that he filled the position with Jonathan Moreland, an outside hire with no relevant experience. Evidence that Mr. Bolder did not post the job opening and that Ms. Simo attempted to apply through informal means endorsed by her employer will likely excuse the requirement that she applied for the specific role. *Id*. at 227; *Digilov v. JPMorgan Chase Bank, N.A.*, 2015 WL 685178, at *12-13 (S.D.N.Y. 2015).

Ms. Simo's successful prima facie showing "raise[s] an inference of discrimination." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1980).

The burden then shifts to 1883 Properties to rebut the presumption of discrimination through evidence that Mr. Bolder's motivation was legitimate and nondiscriminatory. *McDonnell Douglas*, 411 U.S. at 802. During her intake interview, Ms. Simo mentioned Mr. Bolder had communicated several performance-related reasons he had not promoted Ms. Simo. To the extent Mr. Bolder can produce admissible evidence in support of these reasons, he will succeed in creating a genuine issue of fact as to whether he discriminated. *Burdine*, 450 U.S. at 254–55. Ms. Simo would then need to prove by a preponderance of the evidence that the nondiscriminatory reasons proffered by Mr. Bolder were pretextual or that discrimination was a "motivating factor" of his decision. 42 U.S.C. § 2000e–2. Circumstantial evidence of Mr. Bolder's discriminatory animus, including remarks about Ms. Simo's status as a working mother and the proximity of the adverse decision to her return from maternity leave, suggests Ms. Simo will likely be able to demonstrate that sex was a motivating factor. 1883 Properties has available the limited affirmative defense that Mr. Bolder would have made the same decision notwithstanding this "impermissible motivating factor," which could limit Ms. Simo's remedies. 42 U.S.C. § 2000e–5(g)(2)(B).

In sum, Ms. Simo has a strong claim that her employer discriminated against her in violation of Title VII. She will be able to state a plausible claim and, depending on the record developed during discovery, could likely withstand a motion for summary judgment, since a reasonable juror could find sex was a motivating factor of Mr. Bolder's decision.

**FACTS**

Anya Simo lives in Queens, New York. She has two children: a nine-year-old and an infant. She has worked at 1883 Properties as the assistant superintendent of the apartment building,

432 Pine Street in Brooklyn, NY, since June 2014. 1883 Properties employs 52 people. The owner of 1883 Properties, Carson Bolder, hired Ms. Simo to assist the building's then superintendent, Clarence Muller. Over her five years as assistant superintendent, Ms. Simo learned from Mr. Muller and assumed several of his responsibilities, including coordinating repairs and liaising with tenants.

In 2016, Mr. Bolder began to expand 1883 Properties. He acquired a new apartment building in Queens and two commercial buildings in Connecticut. In 2017, Ms. Simo applied to the Queens superintendent position. Mr. Bolder instead hired an older male candidate with significant experience as a superintendent. Mr. Bolder assured Ms. Simo that Mr. Muller would retire in a few years, and by then, Ms. Simo would know the superintendent role at 432 Pine Street like "the back of her hand."

Ms. Simo gave birth to her second child in April 2019 and returned from maternity leave in August 2019. The following month, Mr. Muller retired. He wrote Ms. Simo a thank-you note that commended her for her "years of excellent work" as his assistant superintendent. Ms. Simo then worked as the de facto superintendent of 432 Pine Street for three weeks. On October 1, Mr. Bolder announced he had hired Mr. Jonathan Moreland to officially replace Mr. Muller. Mr. Bolder met with Ms. Simo and explained that her frequent lateness and 432 Pine Street's receipt of six Environmental Control Board ("ECB") citations over the past two years contributed to his decision. He also said the superintendent position was a "24/7 role," for which Ms. Simo was not ready at this "stage of her life." Bolder admitted Mr. Moreland had no experience as a superintendent or assistant superintendent and asked Ms. Simo to train him in the role. Ms. Simo has monitored 1883 Properties' job portal since 2017 and claims the portal did not list the superintendent role for 432 Pine Street.

Ms. Simo believes Mr. Bolder discriminated against her because of her sex and her status as a new mother. Ms. Simo returned from maternity within two months of Mr. Bolder's decision to replace Mr. Muller with Mr. Moreland. Mr. Bolder made derogatory remarks referencing Ms. Simo's status as a working mother in the past, referring to Ms. Simo as "Super Mom." Additionally, Ms. Simo reminded Mr. Bolder to consider her for Mr. Muller's replacement one week before her leave. During the same conversation, Mr. Bolder said, "work-life balance is impossible with a newborn. Babies need their moms."

## ANALYSIS

### I. Title VII Burden-Shifting Framework

Under Title VII, it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e–2(a)(1). In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court outlined a framework for a Title VII claim. First, the plaintiff must establish a prima facie case, which creates a "presumption that the employer unlawfully discriminated." *Burdine*, 450 U.S. at 254. Second, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for the adverse event. *McDonnell Douglas*, 411 U.S. at 802. Third, if the defendant carries that burden, the plaintiff must prove by a preponderance of the evidence that the defendant's proffered reason is pretext for discrimination. *Burdine*, 450 U.S. at 253. Alternately, the plaintiff can prevail by demonstrating that discrimination was a "motivating factor" for the adverse employment decision. 42 U.S.C. § 2000e–2(m). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

### II. Ms. Simo's Prima Facie Case

The prima facie case of a failure to-promote claim under Title VII requires the plaintiff to demonstrate (1) that she is a member of a protected class, (2) that she applied to and was qualified for a position for which the employer sought applicants, (3) that the employer passed over her for the role, and (4) that the employer continued to seek applicants with the plaintiff's qualifications. *Petrosino v. Bell Atl.*, 385 F.3d 210, 226 (2d Cir. 2004). The burden of this prima facie showing is de minimis, though Ms. Simo must put forward some admissible evidence to support her claims. *Hill v. Rayboy-Brauestein*, 467 F. Supp. 2d 336, 356–57 (S.D.N.Y. 2006). Ms. Simo likely can establish a prima facie case of discrimination, though faces some challenges with the second prong.

The first, third, and fourth prongs of Ms. Simo's prima facie case are straightforward. Ms. Simo is a member of a protected class. She alleges Mr. Bolder discriminated against her because of her sex—in particular, because of her status as a working mother of an infant. Title VII's prohibition of sex-based discrimination includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Mr. Bolder passed over Ms. Simo for the promotion by hiring Mr. Moreland as superintendent of 432 Pine Street. He sought at least one applicant, Mr. Moreland, with the plaintiff's qualifications.

Ms. Simo will likely also be able to establish the second prong of the prima facie case: that she applied to and was qualified for the superintendent position. Plaintiffs need only put forward a "minimal showing of qualification." *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 409 (2d Cir. 1991). Ms. Simo can easily make such a showing: she had served as assistant superintendent of 432 Pine Street for over five years; she assumed all responsibilities of superintendent in the three weeks between Mr. Muller's retirement and Mr. Moreland's start; Mr. Muller's thank-you note to Ms. Simo commended her for her competence; and Mr. Bolder believed Ms. Simo knew the role well enough to train Mr. Moreland. At this stage, Ms. Simo would not need to anticipate

other explanations for Mr. Bolder's decision that might call into question her capability and job performance. *Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001).

Moreover, while failure-to-promote claims ordinarily require that a plaintiff identify a specific position to which she applied, Mr. Bolder's idiosyncratic hiring process likely excuses Ms. Simo from this requirement. In *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d. Cir. 2004), the Second Circuit explained that the "facts of a particular case" can make "specific application a quixotic requirement." If the employer did not post the specific vacancy and the employee either did not know of the vacancy before it was filled or "attempted to apply . . . through informal procedures endorsed by the employer," the employee might be excused from the "specific application" requirement. *Id.* at 277. In her interview, Ms. Simo noted Mr. Bolder did not post the position on the 1883 Properties job site, which she routinely monitored. Though she was unable to formally apply for the role, Mr. Bolder indicated she was in contention as early as 2017, when he said that after a couple more years of experience, she would know the superintendent job at 432 Pine Street like "the back of her hand." The plaintiff in *Digilov v. JPMorgan Chase Bank, N.A.*, 2015 WL 685178 (S.D.N.Y. 2015) established his prima facie case under similar circumstances. In *Digilov*, the plaintiff "made repeated efforts" for his employer to consider him for a position "that either went ignored or were specifically rebuffed." Ms. Simo's similar attempts to apply informally through methods "endorsed by her employer," such as applying to the 2017 superintendent position and reminding Mr. Bolder to consider her for the role before her maternity leave, likely suffice to excuse her from the specific application requirement. As such, Ms. Simo should be able to establish a prima facie case under Title VII, which creates the inference that her employer failed to promote her because of her sex.

**III. Employer's Nondiscriminatory Rationale**

After the plaintiff establishes her prima facie case, the burden shifts to the defendant to produce a legitimate, nondiscriminatory explanation for the adverse employment decision. *McDonnell Douglas Corp.*, 411 U.S. at 802. Here, through admissible evidence, 1883 Properties must raise a genuine issue of fact as to whether Mr. Bolder discriminated against Ms. Simo. *Burdine* at 254. Mr. Bolder will likely cite several reasons he hired Mr. Moreland versus Ms. Simo, including that he thought Ms. Simo was frequently late to work and because of the ECB citations 432 Pine Street received during her tenure. Business records like time sheets might raise an issue of fact as to Ms. Simo's punctuality. ECB citations, moreover, are likely admissible as public records that could raise an issue of fact as to Ms. Simo's competence. These purported performance deficiencies would constitute legitimate, nondiscriminatory explanations for Mr. Bolder's adverse employment decision. *See Moore v. Metropolitan Transp. Auth.*, 999 F. Supp. 2d 482, 495 (S.D.N.Y. 2013). Mr. Bolder might also put forward legitimate reasons for his decision that he has not communicated to Ms. Simo. 1883 Properties can thus likely raise a genuine issue of fact as to whether it failed to promote Ms. Simo because of her sex and carry its burden of production.

**IV. Ms. Simo's Burden of Persuasion: Proving Pretext or Mixed Motive**

Ms. Simo bears the ultimate burden of persuasion to prove by a preponderance of the evidence either that Mr. Bolder's "legitimate" reasons were pretextual and that his true motivation for failing to promote Ms. Simo was her sex, or that sex was a "motivating factor" of his decision. *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008). The record "viewed as a whole" must support this showing. *Walsh v. New York City Hous. Auth.*, 828 F.3d 70 (2d Cir. 2016).

At the outset of this case, there is not enough information to predict whether Ms. Simo will be able to prove Mr. Bolder's reasons were pretextual. A plaintiff can demonstrate pretext through direct or circumstantial evidence. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.

133, 147 (2000) (explaining that circumstantial evidence that the defendant's professed reason for an employment decision "is unworthy of credence" can evince intentional discrimination). Demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Mr. Bolder's "legitimate" reasons can indicate that they are pretextual. *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013). Punctuality, for example, might not have factored into Mr. Bolder's decision, because the promotion came with an on-site apartment, and Mr. Bolder was likely aware that the unpredictable traffic during Ms. Simo's commute from Queens would contribute to occasional tardiness. However, Mr. Bolder also raised the ECB violations as a reason for not promoting Ms. Simo. More information about the violations is needed to understand whether Mr. Bolder failed to promote Ms. Simo because he genuinely questioned her competence. Moreover, Mr. Bolder may introduce additional, legitimate reasons for his decision not to promote Ms. Simo, which could prevent her from establishing but-for causation.

However, the Civil Rights Act of 1991 amended Title VII to encompass "mixed motive" cases, in which the plaintiff's protected characteristic might be one of several reasons for the employer's adverse decision. If Ms. Simo can prove by a preponderance of the evidence that her sex was a "motivating factor" in Mr. Bolder's decision, she can still establish a Title VII violation. 42 U.S.C. § 2000e–2(m). *See Desert Palace, Inc.*, 539 U.S. at 101 (explaining that to receive a mixed-motive instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude" that sex "was a motivating factor for any employment practice"). Ms. Simo would not need to prove her employer's reasons were pretextual. *Holcomb*, 521 F.3d at 142 (2d Cir. 2008).

Information from Ms. Simo's interview suggests she can likely demonstrate that sex was a motivating factor in Mr. Bolder's decision. Again, Ms. Simo can rely on direct or circumstantial evidence, including the credibility of her employer's explanation and the actions or remarks of

decisionmakers, to do so. *Desert Palace, Inc.*, 539 U.S.at 101. *See Vaughn v. Empire City Casino at Yonkers Raceway*, 2017 WL 3017503 at *16 (S.D.N.Y. 2017) (advising that derogatory remarks by those with decision-making authority can be probative of discriminatory intent). Mr. Bolder's remarks about motherhood and the timing and sequence of his failure to promote Ms. Simo indicate sex was a motivating factor in his decision. Mr. Bolder told Ms. Simo that she was not at the right "stage of her life" for the promotion, and that being a superintendent is a "24/7 job" during the same meeting he informed her he had hired Mr. Moreland. He derisively referred to Ms. Simo as "Super Mom." Further, when she requested consideration for the superintendent role a week before her maternity leave, Mr. Bolder said "work-life balance is impossible with a newborn. Babies need their moms," insinuating that he thought Ms. Simo should not take on additional work responsibilities because of her status as a mother. The substance and proximity of Mr. Bolder's remarks to the adverse decision render them probative of discriminatory intent. *See Tomassi v. Insignia Fin. Grp., Inc*., 478 F.3d 111, 115 (2d Cir. 2007) ("The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be."). His remarks also suggest he was motivated by the illicit presumption that because she was a mother, Ms. Simo would, or should, be less dedicated to her job. *See Price Waterhouse v. Hopkins*, 490 U.S 228, 250–53 (1989) ("[S]tereotyped remarks can certainly be *evidence* that gender played a part [in the employment decision].").

Ms. Simo thus has a strong claim under Title VII that her sex was a motivating factor in Mr. Bolder's decision. Should Ms. Simo's mixed-motive claim prevail, Mr. Bolder has a limited affirmative defense available that he would have come to the same decision notwithstanding the discriminatory motive. 42 U.S.C. § 2000e–5(g)(2)(B) ("[T]he court . . . may grant declaratory

relief, injunctive relief . . . and attorney's fees and costs" but "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."). 1883 Properties' ability to prove up this defense could limit the relief available to Ms. Simo. At the outset of this case, however, there is insufficient information to predict the strength of the limited affirmative defense.

## CONCLUSION

Ms. Simo has a strong sex discrimination claim under Title VII for failure-to-promote. She should be able to establish a prima facie case that her employer discriminated against her by relying on stereotypes about women as caretakers when it failed to promote her to superintendent. More information about any nondiscriminatory reasons Mr. Bolder might proffer to explain his decision is necessary to understand whether Ms. Simo can prove pretext. However, Ms. Simo can likely establish that sex-based discrimination was a motivating factor of her employer's decision. I recommend we consult with Ms. Simo about the merits of her case along with the risk that Mr. Bolder will provide legitimate reasons for his decision that might diminish her likelihood of success or available remedies.

## Applicant Details

| | |
|---|---|
| First Name | **Molly** |
| Last Name | **Harwood** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **molly.harwood@gmail.com** |
| Address | **Address**<br>**Street**<br>**137 Atlantic Ave**<br>**City**<br>**Brooklyn**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**11201**<br>**Country**<br>**United States** |
| Contact Phone Number | **8473473184** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **University of Michigan-Ann Arbor** |
| Date of BA/BS | **May 2013** |
| JD/LLB From | **Vanderbilt University Law School**<br>**http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx** |
| Date of JD/LLB | **May 14, 2021** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Environmental Law and Policy Annual Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | |

## Bar Admission

| | |
|---|---|
| Admission(s) | **New York** |

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Rose, Barbara
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6153435805
Green, Barbara
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Kay, Susan
susan.kay@vanderbilt.edu
615-322-4151

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

April 29, 2023

Dear Judge Matsumoto,

I am seeking a position in your chambers for the 2025-2026 term. I graduated from Vanderbilt University Law School in May of 2021. I am currently a staff attorney at the Nassau County Legal Aid Society. Your career path demonstrates varied and extensive experiences in litigation and public service work. Your decisions demonstrate a fair hand when interpreting the law. I would greatly appreciate the opportunity to learn from you.

I am passionate about public service and public interest legal work. I have demonstrated that passion through my work experiences. In college, I facilitated theater workshops in prisons. Following my undergraduate graduation, I was a case manager in the foster care system in the Bronx and in homeless services in the Lower East Side.

During law school, I sought out internships focused on legal writing opportunities in both civil and criminal law to hone my legal writing skills. I strengthened my legal research skills working as a teaching assistant for the legal writing department during my second year of law school and as a research assistance for a housing clinic professor in my third year. Additionally, in my third year, I was the Executive Editor of the Environmental Law and Policy Annual Review.

In every position I've held, I have watched how the courts have affected the lives of my clients. Prior to law school, I had a very limited understanding of why my clients received the results they did. Becoming a lawyer has allowed me to better understand the intricacies of the legal system. The opportunity to be a clerk in your chambers would allow me to deepen my understanding of the law. I would like to use the skills gained in your chambers to better advocate for my clients and pursue a career in impact litigation.

Included in my application are my resume, my law school transcript, my undergraduate transcript, and two writing samples. Letters of recommendation from the following professors and employers will arrive separately:

**Barbara Rose**
*Legal Writing Professor*
Vanderbilt Law School

**Susan Kay**
*Associate Dean*
*For Experiential Education*
Vanderbilt Law School

**Barbara Raney**
*District Court Bureau Chief*
Nassau County Legal Aid

Please let me know if I can provide any additional information. I look forward to speaking with you. Thank you for your time and consideration.

Molly Harwood

# Molly Harwood

(847) 347-3184 // molly.harwood@gmail.com // Brooklyn, NY

**ADMISSIONS:** New York State Bar, Second Department, 2022

## WORK EXPERIENCE

**Nassau County Legal Aid Society** // Hempstead, NY // Fall 2021 to Present
Staff Attorney
-Conducted arraignments for indigent and non-indigent individuals charged with felony and misdemeanor offenses
-Filed over forty motions, including a successful writ of habeas corpus and a motion to show cause
-Managed a high-volume caseload and appeared in daily court proceedings

**Nashville Defenders** // Nashville, TN // Winter 2020 to Summer 2020
Legal Intern
-Conducted legal research and writing, analyzed discovery and initiated investigation on cases
-Completed Gideon's Promise Summer Training Institute

**The Door** // New York, NY // Summer 2020
Legal Intern
-Provided legal direct services to young people across all five boroughs of New York City virtually

**Neighborhood Defender Service of Harlem** // New York, NY // Summer 2019
Legal Intern
-Conducted extensive legal research and writing, including multiple successful motions
-Facilitated weekly walk-in intake program provided to the local Harlem community

**Center for Urban Community Services** // New York, NY // Fall 2016 to Summer 2018
Case Manager III- Supportive Housing
-Provided therapeutic counseling, crisis intervention & psychoeducation for a high-volume caseload

**Graham Windham Foster Care Agency** // Bronx, NY // Summer 2013 to Fall 2016
Case Planner - Treatment Family Foster Care
-Coordinated/monitored services for children, foster parents, and biological families in the child welfare system

**Prison Creative Arts Project** // Ann Arbor, MI // Winter 2011 to Spring 2013
Workshop Facilitator
-Editor of the Michigan Review of Prisoner Creative Writing - Vol. 5
-Facilitated theater workshops in two men's prisons in Michigan

## EDUCATION

**Vanderbilt University Law School** // Nashville, TN // Class of 2021
Juris Doctor
*VLS Honors*: National Association of Women Lawyers Outstanding Law Student Award; Justice-Moore Scholar; Cal Turner Moral Leadership Fellow; Lightfoot, Franklin & White Legal Writing Best Oralist

*Activities*: Criminal Law Clinic*;* ENVIRONMENTAL LAW AND POLICY REVIEW, *Executive Editor*; Legal Aid Society, *Director of Medical Legal Partnership* (2019-2020); Teaching Assistant, *Legal Writing Program* (2019-2020)

**University of Michigan** // Ann Arbor, Michigan // Class of 2013 //
Bachelor of Arts, Concentration in Spanish (Honors); Social Theory and Practice (Highest Honors); Minor in Philosophy
Thesis: *The Fiscal Cliff of Capital Punishment: The Impact of Economics on the Public Perception of the Death Penalty*

VANDERBILT UNIVERSITY

OFFICE OF THE
University Registrar

110 21st Avenue South
PMB 407701
Nashville, TN 37240-7701
Phone: (615) 322-7701
Fax: (615) 343-7709
Email: university.registrar@vanderbilt.edu
Web: registrar.vanderbilt.edu

To: Molly Harwood

Re: Transcript of: Harwood, Molly Katherine

Request Number: 37146847



## Vanderbilt University Official Transcript
Statement of Authenticity

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OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240

VANDERBILT UNIVERSITY



**Name : Molly Katherine Harwood**
**Student # : 000565843**
**Birth Date : 06/03**



**Degree(s) Awarded**

Degree: Doctor of Jurisprudence
Confer Date: 2021-05-14
Major: Law

**Academic Program(s)**

Award: Women Lawyers' Outstanding Stu

Law J.D.
Law Major

**Law Academic Record (4.0 Grade System)**

**2018 Fall**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 6010 | **Civil Procedure** | 4.00 | **B+** | 13.20 |
| Instructor: | | Suzanna Sherry | | | |
| LAW | 6020 | **Contracts** | 4.00 | **B+** | 13.20 |
| Instructor: | | Rebecca Allensworth | | | |
| LAW | 6040 | **Legal Writing I** | 2.00 | **B+** | 6.60 |
| Instructor: | | Barbara Rose<br>Emily Sachs | | | |
| LAW | 6060 | **Life of the Law** | 1.00 | **P** | 0.00 |
| Instructor: | | Amanda Rose<br>Ganesh Sitaraman | | | |
| LAW | 6090 | **Torts** | 4.00 | **B** | 12.00 |
| Instructor: | | Sean Seymore | | | |

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 15.00 | 14.00 | 45.00 | 3.214 |
| CUMULATIVE: | 15.00 | 14.00 | 45.00 | 3.214 |

**2019 Spring**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 6030 | **Criminal Law** | 3.00 | **A-** | 11.10 |
| Instructor: | | Christopher Slobogin | | | |
| LAW | 6050 | **Legal Writing II** | 2.00 | **B+** | 6.60 |
| Instructor: | | Barbara Rose<br>Emily Sachs | | | |
| LAW | 6070 | **Property** | 4.00 | **A-** | 14.80 |
| Instructor: | | Michael Vandenbergh | | | |
| LAW | 6080 | **Regulatory State** | 4.00 | **B+** | 13.20 |
| Instructor: | | Kevin Stack | | | |
| LAW | 7400 | **Juvenile Justice** | 3.00 | **A-** | 11.10 |
| Instructor: | | Terry Maroney | | | |

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 16.00 | 16.00 | 56.80 | 3.550 |
| CUMULATIVE: | 31.00 | 30.00 | 101.80 | 3.393 |

**2019 Fall**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 5900 | **Moot Court Competition** | 1.00 | **P** | 0.00 |
| Instructor: | | Susan Kay | | | |
| LAW | 7078 | **Constitutional Law I** | 3.00 | **A-** | 11.10 |
| Instructor: | | Jessica Clarke | | | |
| LAW | 7116 | **Corporations & Bus. Ent.** | 4.00 | **A** | 16.00 |
| Instructor: | | Randall Thomas | | | |
| LAW | 7395 | **Environmental Annual Rev** | 1.00 | **P** | 0.00 |
| Instructor: | | Michael Vandenbergh<br>Linda Breggin | | | |
| LAW | 7464 | **Legl Writing Asst.. for Credit** | 1.00 | **P** | 0.00 |
| Instructor: | | Jennifer Swezey | | | |
| LAW | 8000 | **Actual Innocence** | 3.00 | **B+** | 9.90 |
| Instructor: | | Terry Maroney | | | |
| LAW | 8130 | **Mntl Hlth Law: Dep Life&Lbrty** | 2.00 | **B+** | 6.60 |
| Instructor: | | Christopher Slobogin | | | |

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 15.00 | 12.00 | 43.60 | 3.633 |
| CUMULATIVE: | 46.00 | 42.00 | 145.40 | 3.461 |

**2020 Spring**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 7124 | **Criminal Pro:Adjudicatio** | 3.00 | **P** | 0.00 |
| Instructor: | | Nancy King | | | |
| LAW | 7395 | **Environmental Annual Rev** | 1.00 | **P** | 0.00 |
| Instructor: | | Michael Vandenbergh<br>Linda Breggin | | | |
| LAW | 7464 | **Legl Writing Asst.. for Credit** | 1.00 | **P** | 0.00 |
| Instructor: | | Jennifer Swezey | | | |
| LAW | 7567 | **Poverty Law** | 2.00 | **P** | 0.00 |
| Instructor: | | Christopher Coleman<br>Amanda Moore | | | |
| LAW | 7671 | **Topics Civil Rights Litigation** | 1.00 | **P** | 0.00 |
| Instructor: | | Phillip Cramer | | | |
| LAW | 7905 | **Externship-In Nashville** | 3.00 | **P** | 0.00 |
| Instructor: | | Susan Kay<br>Spring Miller | | | |
| LAW | 8040 | **Constitutional Law II** | 3.00 | **P** | 0.00 |
| Instructor: | | Sara Mayeux | | | |

During the Spring 2020 semester, Vanderbilt University was affected by the global COVID-19 pandemic. Instructional methods were modified and temporary changes to grading policy were implemented, including adjustments to the options for pass/fail grading. For more information, see: https://registrar.vanderbilt.edu/transcripts/transcript-key.php.

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 14.00 | 0.00 | 0.00 | 0.000 |
| CUMULATIVE: | 60.00 | 42.00 | 145.40 | 3.461 |

**Secure Electronic Harwood**

**Molly Harwood**
**molly.harwood@vanderbilt.edu**

STUDENT IS ELIGIBLE TO ENROLL UNLESS OTHERWISE NOTED.
SIGNATURE IS WHITE WITH A GOLD BACKGROUND.
A RAISED SEAL IS NOT REQUIRED.

BART P. QUINET
UNIVERSITY REGISTRAR
**Date: 12/17/2021**

OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240

VANDERBILT UNIVERSITY



**Name : Molly Katherine Harwood**
**Student # : 000565843**
**Birth Date : 06/03**



**2020 Fall**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 6749 | **Criminal Practice Clinic** | 4.00 | **A** | 16.00 |
| Instructor: | | Susan Kay | | | |
| LAW | 7126 | **Crim Pro: Investigation** | 3.00 | **A** | 12.00 |
| Instructor: | | Christopher Slobogin | | | |
| LAW | 7180 | **Evidence** | 4.00 | **B+** | 13.20 |
| Instructor: | | Susan Kay | | | |
| LAW | 7395 | **Environmental Annual Rev** | 1.00 | **P** | 0.00 |
| Instructor: | | Michael Vandenbergh<br>Linda Breggin | | | |
| LAW | 7573 | **The Legal Profession** | 1.00 | **P** | 0.00 |
| Instructor: | | Spring Miller | | | |
| LAW | 8400 | **Trial Advocacy** | 3.00 | **P** | 0.00 |
| Instructor: | | Wendy Tucker<br>James Mcnamara | | | |

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 16.00 | 11.00 | 41.20 | 3.745 |
| CUMULATIVE: | 76.00 | 53.00 | 186.60 | 3.520 |

**2021 Spring**

| | | | | | |
|---|---|---|---|---|---|
| LAW | 6759 | **Crim Prac Clinic Adv** | 2.00 | **P** | 0.00 |
| Instructor: | | Susan Kay | | | |
| LAW | 7395 | **Environmental Annual Rev** | 1.00 | **P** | 0.00 |
| Instructor: | | Michael Vandenbergh<br>Linda Breggin | | | |
| LAW | 7561 | **Policing in the 21st Century** | 1.00 | **P** | 0.00 |
| Instructor: | | Arjun Sethi | | | |
| LAW | 7600 | **Professional Respons.** | 3.00 | **A-** | 11.10 |
| Instructor: | | Kevin Klein | | | |
| LAW | 8420 | **Adv Evid&Trial Advoc: Criminal** | 2.00 | **A** | 8.00 |
| Instructor: | | William Cohen<br>Richard Mcgee | | | |
| LAW | 9100 | **Law and History Seminar** | 3.00 | **A-** | 11.10 |
| Instructor: | | Sara Mayeux | | | |

| | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|
| SEMESTER: | 12.00 | 8.00 | 30.20 | 3.775 |
| CUMULATIVE: | 88.00 | 61.00 | 216.80 | 3.554 |

---------- NO ENTRIES BELOW THIS LINE ----------



**Secure Electronic Harwood**

**Molly Harwood**
**molly.harwood@vanderbilt.edu**

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SIGNATURE IS WHITE WITH A GOLD BACKGROUND.
A RAISED SEAL IS NOT REQUIRED.

BART P. QUINET
UNIVERSITY REGISTRAR
**Date: 12/17/2021**

**Vanderbilt University**
**Office of the University Registrar**
**PMB 407701**
**110 21st Avenue South, Suite 110**
**Nashville, TN 37240-7701**
**615-322-7701**
**university.registrar@vanderbilt.edu**
**registrar.vanderbilt.edu**

**Academic Calendar:** The academic year consists of fall and spring semesters and a summer term. The Doctor of Medicine program is offered on a year term.

**Academic Units:** Credit hours are semester hours except in the Doctor of Medicine program. Credits in the Doctor of Medicine program are course- or rotation-based.

**Accreditation:** Vanderbilt University is accredited by the Southern Association of Colleges and Schools.

**Release of Information:** This document is released at the request of the student and in accordance with the Family Educational Rights and Privacy Act of 1974. It cannot be released to a third party without the written consent of the student.

**Course Numbers (effective Fall 2015):**

0000-0799 Non-credit, non-degree courses; do not apply to degree program
0800-0999 Courses that will eventually be given credit (e.g., study abroad)
1000-2999 Lower-level undergraduate courses

3000-4999 Upper-level undergraduate courses
5000-5999 Introductory-level graduate and professional courses (including those co-enrolled with undergraduates)
6000-7999 Intermediate-level graduate and professional courses
8000-9999 Advanced-level graduate and professional courses

Additional information on course numbering is available at registrar.vanderbilt.edu/faculty/course-renumbering/.

**Course Numbers (prior to Fall 2015):**

**100- and 1000-level courses** are primarily for freshmen and sophomores. May not be taken for graduate credit.

**200- and 2000-level courses** are normally for juniors and seniors. Selected courses may be taken for graduate credit.

**300-, 3000-, and above-level courses** are for graduate and professional credit only - unless special permission is granted.

**Grading Systems:**

For information about grading systems in place prior to the dates listed, visit registrar.vanderbilt.edu/transcripts/transcript-key/.

**College of Arts and Science (A&S)**, effective Fall 1982;
**Blair School of Music (BLR)**, effective Fall 1986;
**Divinity School (DIV)**, effective Fall 1983;
**Division of Unclassified Studies (DUS)**, effective Fall 1982;
**School of Engineering (ENG)**, effective Fall 1991;
**Graduate School (GS)**, effective Fall 1992;
**Law School (LAW)**, effective Fall 1988;
**School of Medicine (MED), Medical Masters and other Doctoral Programs**, effective Fall 2010;
**School of Nursing (NURS)**, effective Fall 2007;
**Peabody College (PC) undergraduate**, effective Fall 1990;
**Peabody College (PC) professional**, effective Fall 1992.

| | | |
|---|---|---|
| A+ | 4.3 | LAW only |
| A+ | 4.0 | Not in A&S, DIV (or BLR, PC as of Fall 2012) |
| A | 4.0 | |
| A- | 3.7 | |
| B+ | 3.3 | |
| B | 3.0 | |
| B- | 2.7 | |
| C+ | 2.3 | |
| C | 2.0 | |
| C- | 1.7 | |
| D+ | 1.3 | Not in PC professional, NURS (or GS, MED as of Fall 2011) |
| D | 1.0 | Not in PC professional, NURS (or GS, MED as of Fall 2011) |
| D- | 0.7 | Not in PC professional, MED, NURS (or GS as of Fall 2011) |
| F | 0.0 | |

**Owen Graduate School of Management (OGSM)**

| **Master of Accountancy,** effective Fall 2011. | | **All Management Programs,** effective Fall 2007. | | |
|---|---|---|---|---|
| A | 4.0 | SP | Superior Pass | 4.0 |
| A- | 3.5 | HP | High Pass | 3.5 |
| B | 3.0 | PA | Pass | 3.0 |
| B- | 2.5 | LP | Low Pass | 2.5 |
| F | 0.0 | F | Fail | 0.0 |

**School of Medicine (MED) Doctor of Medicine Program**, effective 2003.

| | | |
|---|---|---|
| H | Honors | Superior or outstanding work in all aspects. |
| HP | High Pass | Completely satisfactory work with some elements of superior work. |
| P | Pass | Completely satisfactory work in all aspects. |
| P* | Marginal Pass | Serious deficiencies requiring additional work (temporary grade). |
| F | Fail | Unsatisfactory work. |

**Current and Cumulative Statistics:**

| | |
|---|---|
| **EHRS** | Earned Hours |
| **QHRS** | Quality Hours |
| **QPTS** | Quality Points |
| **GPA** | Grade Point Average (calculated as GPA = QPTS/QHRS) |

**Other Symbols:**

| | |
|---|---|
| AB | Absent from final examination (temporary grade)** |
| AU/AD | Audit** |
| AW | Audit Withdrawal** |
| CE | Credit by Examination |
| CR | Credit only (no grade due) |
| E | Condition, with permission to retake exam (temporary grade)** |
| H | Incomplete in Arts and Science Honors course (temporary grade)** Honors in Divinity School** |
| I | Incomplete (temporary grade)** + |
| IP | In Progress (temporary grade)** |
| LP | Low Pass (DIV only) |
| M | Absent from final examination (temporary grade)** |
| MI | Absent from final examination and incomplete (temporary grade)** |
| NC | No credit toward current degree** |
| NO EQ | Transfer or study abroad coursework with no Vanderbilt equivalent |
| P | Pass** |
| PM | Pass-Medical (GS only) |
| R | Repeat of previous course |
| RC | Previous trial of repeated course** |
| S | Satisfactory** |
| U | Unsatisfactory** |
| W | Withdrawal** |
| WF | Withdrawal while failing** |
| WP | Withdrawal while passing** |
| X | Grade unknown, hours earned awarded** |

** Does not affect grade point average. (Prior to Fall 2008, the AB, I, M, and MI grades were calculated as an F in A&S and PC.)
+ May be a permanent grade in DIV, GS, LAW, and MED.

**UNIV:** Courses offered in the UNIV subject are University Courses. The University Course initiative was developed to promote new and creative trans-institutional learning. For more information, please see vu.edu/university-courses.

For changes to this key since the last revision, please visit registrar.vanderbilt.edu/transcripts/transcript-key/.

May 03, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Molly Harwood is applying to be a law clerk working with you in your chambers, and I wholeheartedly support her application. I can think of no one whose abilities and interests align more closely with this position. I have come to know Molly well, first when she was a student in my class and later when we worked as a teaching team for a 1L Legal Writing class. As a result, I feel able to speak to the ways in which Molly could contribute significantly to your work.

During the academic year 2018-2019, Molly was a student in my section of the Legal Writing class required of all first-year students at Vanderbilt Law School. This was a small section of twenty students, and the course required frequent conferences; I had the opportunity to speak with Molly often that year, and I came to know of her background in social work and her commitment to helping people who are most vulnerable. She explained that she felt called upon to do more and that she believed obtaining a law degree would expand her ability to help these people.

From an academic standpoint, Molly is an outstanding student. For both fall semester 2018 and spring semester 2019, she did a wonderful job in our section. Her analysis and writing are excellent, and she was consistent and punctual in all class obligations. She particularly excelled in oral advocacy, and she was the top oralist in our section, winning the Lightfoot, Franklin & White Award for Best Oralist.

Then, the following academic year, Molly was selected as a Teaching Assistant for the Legal Writing course, which is also a notable accomplishment. TA applicants tend to be the most motivated and talented of the students in the course, and the application process is very competitive. The fact that the director of the course chose Molly is additional validation of her skills. I was fortunate that Molly was assigned to be my TA, and it was purely a pleasure to work with her as a teammate in teaching our students. The students themselves told me that they felt lucky to have Molly as a TA, because she invariably went the extra mile to help them, not just with citation and legal writing, but also with any question about adjusting to law school.

After the pandemic caused the abrupt end to our in-person instruction in March 2020, Molly made an especial effort to be available virtually to our students. In fact, even after classes ended, our section continued weekly meetings throughout the summer and until school resumed in August. During the worst of the pandemic in New York City, Molly moved back there, which caused me untold worry. She told me that she felt like she could do more there to help out. She worked for The Door, as a legal intern, providing a wide range of legal services to youth throughout the city. In her free time, she volunteered as a shopper for others whose age or underlying conditions made it too dangerous for them to go out. She also worked to distribute food to those suffering from food insecurity. Since graduating, Molly has worked at the Nassau County Legal Aid Society.

Just in case I may have made Molly sound too saintly, though, please be assured that she is funny and pragmatic and down-to-earth. Fundamentally, Molly is an extremely insightful, intelligent, and hardworking individual. I am confident that she would be a significant asset to you. It is without hesitation that I recommend her to work with you as a law clerk. If I may provide you with more information, please contact me at any time.

Best regards,

Barbara Rose
Instructor in Law
Vanderbilt University Law School

# LEGAL AID SOCIETY OF NASSAU COUNTY, NY

*DISTRICT COURT BUREAU*
40 Main Street, Hempstead, NY 11550
(516) 560-6400
FAX: (516) 572-1959
NCCC ONLY: (516) 560-6490




January 13, 2022

To Whom It May Concern:

I am writing this letter on behalf of Molly Harwood who has been employed as a staff attorney with the Nassau County Legal Society since September 2021. Immediately upon her employment, Molly was eager to become a well versed and competent Legal Aid attorney. She was engaged and prepared during training, and then seamlessly transitioned into representing her clients in the courtroom. In her short time as an attorney, she has been a tireless advocate, effectively negotiating and plea bargaining on her client's behalf. She has appropriately strategized her cases, demonstrating her knowledge of criminal law and procedure and her ability to creatively argue the law. She is also an effective legal writer as she has successfully submitted motions on behalf of her clients which have been granted. Molly has also proven to be a formidable litigator with natural talent as she has effectively represented a client in a pre-trial suppression hearing.

Molly is also willing to go above and beyond to help her clients. She is a conscientious attorney who is compassionate and commitment to serving the best interests of her clients. Molly is always prompt, works diligently, and is a respectful professional who works cooperatively with her colleagues, court staff, prosecutors and Judges. Molly would be an asset as a Judicial Clerk and I highly recommend her for the position. If you have any questions, feel free to reach me at 516 560-6403.

Respectfully,

Barbara Raney

May 03, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my distinct pleasure to submit this letter in support of Ms. Harwood's application for a clerkship in your chambers. I knew Ms. Harwood while she was a student at Vanderbilt Law School and have kept up with her since her graduation last spring.

I first met Ms. Harwood during her first year of law school while she was a participant in the Social Justice Reading Group during the spring semester 2019. Of all the participants, I remember her comments most vividly. And the reason that I remember her is because of her thoughtful and incisive comments. Although the reading group was a non-credit-bearing extracurricular activity, Ms. Harwood was an active participant in the group and had clearly done all the assigned readings. She was able to add significantly to the discussion by incorporating her experiences as a social worker in New York prior to attending law school. But even more impressive was her intellectual curiosity and her desire to engage in the law and legal analysis.

I got to know Ms. Harwood very well when she was a student in the Criminal Practice Clinic (fall semester 2020) and Advanced Criminal Practice Clinic (spring semester 2021) that I teach. Working in the clinic during the pandemic posed enormous challenges to faculty members and students. Students had to be creative in finding ways to stay in contact and develop relationships with their clients while at the same time complying with Vanderbilt's COVID protocols which, in part, prohibited them from meeting with clients in person. In addition, the courts were essentially closed for significant periods of time during the school year. Ms. Harwood was totally committed to her clients and worked tirelessly to ensure that the attorney-client relationship was not adversely affected by the protocols. She maintained both a commitment to the clients and to the course, as well as a positive outlook, despite the uncertainty of that time.

Knowing Ms. Harwood's excellent skills and work ethic, I assigned her to a particular complicated case. Not only was the client facing federal as well as state charges (we were representing him on the state charges and a federal public defender was representing him on the federal charges) but there was well over 1000 pages of discovery, as well as significant video evidence, in the case. Ms. Harwood diligently reviewed the materials (several times to make sure she was completely schooled in them) and became the in-house expert on all the discovery and its location in the file. She excelled at collaborative discussions about the case and the possible avenues of investigation and research.

In the clinic, Ms. Harwood worked collaboratively with all the other students and earned their trust and respect. Once she agreed to take on a task, I never needed to worry about it or remind her. Her work product was excellent and she could be relied upon to complete tasks on time and professionally. Her research and writing were superb.

Ms. Harwood was also a student in the Evidence class I taught in the fall semester 2020. In that class, as well, I saw her commitment to understanding the nuances and effects of each rule. She didn't just want to learn Evidence so that she could do well in the course and pass the bar, she really wanted to understand both the substance of the rules and the policies behind them.

Ms. Harwood is also a delightful person with whom to interact. She is well-liked and well-respected by her classmates and she is a good listener as well as an interesting conversationalist. I always enjoyed spending time with her, whether discussing law or any random topic.

Ms. Harwood would be an excellent clerk. Her work ethic, the quality of her work and her commitment to excellence would be a credit to your chambers. She would get along well and work collaboratively with everyone in chambers and in the courthouse. In addition, Ms. Harwood would be an excellent representative of your chambers.

As you can see, I wholeheartedly and without any reservation recommend Ms. Harwood to you. Please let me know if I can provide you with any additional information.

Very truly yours,

Susan L. Kay

Susan Kay - susan.kay@vanderbilt.edu - 615-322-4151

**Writing Sample**
**Omnibus Motion**

To whom it may concern,

Please find my writing sample below. I submitted the following omnibus motion in March of 2022 in my role as a Legal Aid attorney in Nassau County, NY. The Prosecution conceded instead of filing an opposition so no decision was rendered by the court. I have removed the client's name and significant identifying information. Please contact me if you have any questions.

Thank you,

Molly Harwood
(847) 347-3184
molly.harwood@gmail.com

## PROCEDURAL HISTORY

On March XX, 2021, Mr. XXXXXXX was arrested and charged with violating Vehicle and Traffic Law ("V.T.L.") §1192.4, Operating a Motor Vehicle Impaired by Drugs, an unclassified misdemeanor; V.T.L. § 1128.C, Slow Traffic: Fail to Keep Right, an infraction. *See* Exhibit A (Uniform Traffic Tickets and Simplified Information). Mr. XXXXXXX was arraigned on a Desk Appearance Ticket on December XX, 2021 before the Honorable Judge Petrocelli, who released Mr. XXXXXXX on his own recognizance.

The District Attorney's Office filed a Certificate of Compliance and Certificate of Readiness with this Court on February 9, 2022, purporting to certify that the District Attorney's office was in compliance with its statutory discovery obligations under C.P.L. § 245 and ready for trial. Defense Counsel never received a Certificate of Compliance or Readiness.

## ARGUMENT

### I. THE CASE SHOULD BE DISMISSED BECAUSE THE ACCUSATORY INSTRUMENT CHARGING MR. XXXXXXX IS INSUFFICIENT.

Criminal prosecution requires a valid and sufficient accusatory instrument. *People v. Cruz*, 2017 NYLJ LEXIS 1160, *2 (2017); *People v. Smalls*, 26 N.Y.S. 3d 134, 44 N.E. 3d 209 (2016) (explaining this is a nonwaivable prerequisite to any criminal prosecution); *People v. Case*, 42 N.Y.2d 98, 99 (1977). An accusatory instrument is facially insufficient if it fails to establish, with non-hearsay, factual allegations, all the elements of the charged offense. C.P.L. §§ 100.40(1), 100.15(3) ("*every* element of the offense charged and the defendant's commission thereof must be supported by non-hearsay allegations of such information and/or any supporting depositions") (emphasis added); *People v. Kalin*, 12 N.Y. 3d 225, 229 (2009); *People v. Casey*, 95 N.Y.2d 354. 361 (2000); *People v. Alejandro*, 70 N.Y. 2d 133 (1987). This is the called the "prima facie" case requirement. *Kalin*, 12 N.Y. 3d at 229.

When ruling on the sufficiency of an information, a court must accept the factual allegations as true. *Id.* However, the court is limited to reviewing the facts as they are set forth in the four corners of the accusatory document. *See People v Voelker*, 172 Misc 2d 564, 658 NYS2d 180 (Crim Ct, Kings County, 1997, Morgenstern, J.). Separate documents must be read separately. S*ee People v Grabinski,* 189 Misc. 2d 307, 731 NYS2d 583 (App Term, 2d Dept 2001). Conclusory language will not suffice as a substitute for evidentiary facts. *People v. Mackey,* 61 Misc.2d 799 (Suffolk Dist. Ct. 1969*); People v. Martes,* 140 Misc.2d 1034 (Kings Cty. Crim. Ct. 1988*); People v. Rodriguez,* 140 Misc.2d 1 (N.Y. Cty. Crim. Ct. 1988*); People v. Shelton*, 136 Misc.2d 644 (Bronx Cty. Crim. Ct. 1987).

Criminal Procedure Law section 100.40(2) provides that a supporting deposition when provided with a simplified traffic information is sufficient on its face when it "substantially conforms to the requirements of [C.P.L. § 100.25 (2)]." *See People v. Matozzo,* 47 Misc. 3d 1212(A) (Nassau Dist. Ct. 2015). In order to conform to the requirements of C.P.L. § 100.25 (2), a simplified traffic information and any attached supporting depositions must contain "allegations of fact, based either upon personal knowledge or upon information and belief, providing reasonable cause to believe that the defendant committed the offense or offenses charged." C.P.L. § 100.25(2). Similarly, a Bill of Particulars is not a discovery device; however, when it is provided to Defense Counsel in conjunction with an instrument, it is considered with and held to the same standards as an accusatory instrument. *People v. Rose,* 8 Misc. 3d 184 *2 (Dist. Ct. Nassau Co. 2005) *citing* Peter Gerstenzang, Handling the DWI Case in New York §§ 20:56, 20:58 (2003-2004 ed). The charging document in the instant case is facially insufficient in regards to multiple charges; therefore, the Court must dismiss the case on the grounds that the accusatory instrument is insufficient.

**a. <u>The Accusatory Instrument Charging Mr. XXXXXXX With Driving With Ability Impaired By Drugs Is Facially Insufficient And Jurisdictionally Defective Because It Does Not Establish Every Element Of The Offense Charged.</u>**

The accusatory instrument charging a violation of V.T.L. § 1192.4 must establish with non-hearsay factual allegations all four elements of Driving While Ability Impaired. The accusatory instrument must allege: (1) the defendant ingested a drug; (2) the drug ingested is one proscribed by Public Health Law ("P.H.L.") § 3306; (3) after ingesting the drug, the defendant operated a motor vehicle; and (4) while operating the motor vehicle, the defendant's ability to operate it was impaired by ingestion of the drug. *People v. Feyjoo,* 64 Misc. 3d 1207(A) (N.Y. City Crim. Ct. 2019); *Matozzo,* 47 Misc. 3d 1212(A) *citing People v. Kahn,* 160 Misc. 2d 594 (Nassau Dist. Ct. 1994).

If there are no factual allegations that the operator's ability was impaired by the use of a drug proscribed under P.H.L. § 3306, then the accusatory instrument is insufficient. *See Feyjoo,* 64 Misc. 3d 1207(A); *People v. Grove,* 2011 NY Slip Op 51779(U), 938 N.Y.S. 2d 229, 229 (2d Dept. 2011). In *Feyjoo,* a driver charged with violating § 1192.4 stated that he had taken Gabapentin and was unaware that it would affect his driving abilities. 64 Misc. 3d 1207(A). The accusatory instrument in *Feyjoo* stated that the officer involved observed the individual to have "bloodshot, watery eyes, slurred speech, to be unable to remain awake or answer questions and unsteady on his feet upon exiting the vehicle." *Id.* The court in *Feyjoo* found that as Gabapentin is not a controlled substance listed in P.H.L. § 3306, the accusatory instrument was insufficient. *Id.*

There are not universal indicators for drug use, unlike symptoms of intoxication; therefore, officer observation alone is not sufficient to provide the requisite reasonable cause required for a V.T.L. § 1192.4 charged in an accusatory instrument. *Matozzo,* 47 Misc. 3d 1212(A) *citing People v. Ortiz,* 6 Misc. 3d 1024(A) (Crim Ct. Bronx Co. 2004). In order to

establish what substance the defendant ingested, an element of V.T.L § 1192.4, the Prosecution must provide either a chemical analysis of the defendant's blood, an admission by the defendant, or analysis from a Drug Recognition Expert. *Feyjoo*, 64 Misc. 3d 1207(A). In *Matozzo*, the accusatory instrument stated that the defendant presented with glassy eyes, slurred speech, shakiness, unsteadiness on his feet, and small pupils. 47 Misc. 3d 1212(A). The court in *Matozzo* held there was nothing in the supporting deposition to provide reasonable cause to believe that the defendant's current state was due to a substance designated in P.H.L § 3306. *Id*.; *see People v. Felicia*, 52 Misc. 3d 212 (N.Y. Crim. Ct. 2016) (holding accusatory instrument sufficient when it stated that drug found in the driver's possession and that drug is included under P.H.L. § 3306 because possession is sufficient to create reasonable cause); *Rose*, 8 Misc. 3d 184 (finding that a written record of a Drug Recognition Expert is sufficient to provide reasonable cause).

The accusatory instrument charging Mr. XXXXXXX never stated a drug of any kind; therefore, the accusatory instrument is insufficient. *See Feyjoo*, 64 Misc. 3d 1207(A); *Grove*, 2011 NY Slip Op 51779(U). In conjunction with the Simplified Traffic Information, the Prosecution provided a Supporting Deposition and Bill of Particulars. *See* Ex. A. The narrative included in the Supporting Deposition merely stated, "refer to bill of particulars." *See* Ex. A. The Bill of Particulars identified a number of observations included on the form as a checklist. In this case, the officers alleged that Mr. XXXXXXX had glassy eyes, impaired speech, and impaired motor conditions. However, the Bill of Particulars never alleged what substance Mr. XXXXXXX ingested. Like in *Matozzo*, there is no allegation concerning what drug caused these signs of alleged impairment, so there is no reasonable cause to believe that Mr. XXXXXXX was impaired by a drug included in P.H.L. § 3306. *See* 47 Misc. 3d 1212(A).

The accusatory instrument neglects to include any of the required avenues of establishing

that Mr. XXXXXXX was impaired by a drug proscribed the P. H. L. § 3306. The accusatory instrument stated that Mr. XXXXXXX refused a blood test after consenting to a breathalyzer on site. *See* Ex. A. None of the charging documents include any statements regarding the name of an alleged drug, a Drug Recognition Expert's observations, or any admissions by Mr. XXXXXXX himself. *See id.*; *Feyjoo*, 64 Misc. 3d 1207(A). *Felicia*, 52 Misc. 3d 212; *Rose*, 8 Misc. 3d 184; Ex. A.

The accusatory instrument is completely inadequate; therefore, it must be dismissed. One of the elements required, that the drug ingested in one proscribed by P.H.L. § 3306, is completely lacking as the type of drug is never alleged at all. V.T.L. § 1192.4; *Feyjoo*, 64 Misc. 3d 1207(A); *Matozzo*, 47 Misc. 3d 1212(A); *Kahn*, 160 Misc. 2d; *see* Ex. A. The other element, that the Defendant's ability to the operate the motor vehicle was impaired by ingestion of a drug is not addressed by anything more than conclusory boxes checked on a Bill of Particulars. *See* Ex. A. While there are references to another drug alleged in other documents, that particular drug, Gabapentin, is not proscribed by the Public Health Law, and the necessary factual allegations that must be provided are non-existent in this case. *See* P.H.L. § 3306; *Feyjoo*, 64 Misc. 3d 1207(A).

**b. <u>The Accusatory Instrument Charging Mr. XXXXXXX With Slow Traffic: Fail Keep Right Is Facially Insufficient And Jurisdictionally Defective Because It Lacks Sufficient Factual Allegations To Establish The Violation Charged.</u>**

In order to be facially sufficient and jurisdictionally valid, a simplified traffic information charging a Defendant with Slow Traffic: Fail Keep Right in violation of VTL § 1128(c) must contain sufficient allegations showing that the named Defendant: (1) was in an area where official traffic control devices directed slow moving traffic to use designated lanes; and (2) that the driver did not obey the directions of every such signal, sign or marking. *See* V.T.L. §

1128(c). Here, the accusatory instrument stated, "observed op go from right most lane to center land to left lane then back to center land and the right lane multiple times." *See* Ex. A. The documents included no statements regarding whether the highway has posted signage indicating that drivers cannot change lanes. None of the documents stated whether Mr. XXXXXXX disobeyed any signage of any kind. *See* Ex. A. The allegation is simply that Mr. XXXXXXX changed lanes multiple times, over an undisclosed period of time. There are no indications or additional charges suggesting these lane changes were unsafe in some way, against the stated laws of the road Mr. XXXXXXX was on, or that this happened in quick succession. This allegation is facially insufficient; therefore, it should be dismissed.

## II. THE DISTRICT ATTORNEY'S CERTIFICATE OF COMPLIANCE IS INVALID PURSUANT TO C.P.L. §§ 245.20 AND 245.50 AS THERE IS REMAINING UNDISCLOSED DISCOVERY MATERIAL.

Criminal Procedure Law section 245.20 sets forth that "when the prosecution has provided the discovery required by § 245.20(1) of this article…it shall serve upon the defendant and file with the court a certificate of compliance." C.P.L. § 245.50(1). Such certificate of compliance must state "that after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery." C.P.L. § 245.20.

The statute creates a broad and non-exhaustive discovery disclosure requirement for the Prosecution. The legislature intended to establish an "open file" discovery standard. *People v. Soto*, 72 Misc. 3d 1153, 1155 (Crim. Ct. 2021) *quoting* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Criminal Procedure Law § 245.10 ("a prosecutor

who fails to engage in 'open file' discovery… may do so at his or her professional peril while also jeopardizing the viability of a prosecution").

In order to adequately comply with the discovery requirements, the Prosecution must disclose "all known" materials as per the plain meaning of the statute. *People v. Adrovic*, 69 Misc. 3d 563, 572 n. 4, (Crim Ct. 2020). The Prosecution must actively ensure that there is a consistent "flow of information" between law enforcement, investigative personnel, and the District Attorney's office "sufficient to place within [the prosecution's] possession or control all material and information pertinent to the defendant and the offense or offenses charged." § 245.55(1). The Prosecution cannot certify compliance if there are outstanding or uncollected materials not provided to Defense Counsel. Criminal Procedure Law section 245 sets no statutory deadline for Defense Counsel to challenge a Certificate of Compliance. *People v. Mauro*, 71 Misc. 3d 548, 551, (Cnty. Ct. 2021) (explaining that the statute is silent as to the timing and form of a motion to challenge a COC).

**a. <u>The Prosecution Filed an Improper Certificate of Compliance Under Subsection "c" of C.P.L. § 245.20(1).</u>**

Under C.P.L. § 245.20(c), the Prosecution is required to provide the names and contact information for all persons the Prosecution knows to have evidence or information relevant to any offense charged. This includes a designation as to which of those persons may be called as witnesses. § 245.20(c).

In this case, the Prosecution has failed to investigate the identity of all persons who have information or evidence relevant to any of the offenses. The Prosecution has failed to serve an Automatic Discovery Form in this case. The Prosecution did not provide a list of all the evidence provided to Defense Counsel, as they are required to do. Additionally, there is no indication as to who the People plan to call as a witness in this case. Until that initial requirement is fulfilled, the

Prosecution cannot certify compliance as they have not properly disclosed all known and required information to declare readiness for trial.

**b. <u>The Prosecution Filed an Improper Certificate of Compliance Under Subsection "e" of C.P.L. § 245.20(1).</u>**

Subsection "e" requires that the prosecution provide "all statements, written or recorded or summarized in any writing or recording… including all police reports, notes of police and other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings." C.P.L § 245.20(1)(e).

The People have filed an improper Certificate of Compliance because the People have failed to provide all discoverable information pursuant to subsection "e" of the discovery laws. C.P.L § 245.20(1)(e). Specifically, at the minimum, the People have failed to provide the blotters, CAD report, Mobile Transmission Data, PDCM 79, PDCM 248, a case report, the radio log, and all other State police discovery documents generated by any and all law enforcement personnel with evidence or information related to this case. The Prosecution did provide a Communication Record Request form that suggests that these pieces of evidence exist. *See* Exhibit B (Communication Record Request). The form indicated that there are CAD reports, radio runs, and Mobile Transmission Data available in this case and that law enforcement requested this evidence for discovery purposes; however, the evidence was not provided to Defense Counsel. Additionally, the Prosecution has failed to provide any notes or write-ups from any employee of the District Attorney's Office regarding this matter, including Early Case Assessment Bureau write ups. *See* C.P.L. § 245.20(1)(e). For the foregoing reasons, it is respectfully submitted that this Court invalidate the Certificate of Compliance on the grounds that the Defendant has been denied access to statutorily required discovery under C.P.L. § 245.

## III. THE CASE SHOULD BE DISMISSED BECAUSE MR. XXXXXXX'S STATUTORY SPEEDY TRIAL TIME UNDER C.P.L. § 30.30 HAS ELAPSED.

Criminal Procedure Law section 30.30 guarantees criminal defendants the right to dismiss all charges against him when the Prosecution fails to answer ready for trial within a prescribed time period. When the offense charged is an unclassified misdemeanor punishable by up to a year of incarceration, the Prosecution must demonstrate that it is ready for trial within ninety days of the commencement of the criminal action. C.P.L. § 30.30 (1)(b). Operating a Motor Vehicle Impaired by Drugs in violation of V.T.L § 1192.4 is an unclassified misdemeanor punishable by up to one year in jail. Therefore, in the present case, the Prosecution must present a sufficient accusatory and declare ready for trial within ninety days of the first court date. *See* C.P.L. § 30.30(1)(b).

The Prosecution will be deemed ready for trial only when there has been an effective announcement of readiness within the time period required, which includes a proper filing of a Certificate of Readiness and Certificate of Compliance. C.P.L. § 245.50(3); § 30.30(5); *People v. Lobato*, 66 Misc 3d 1230(a) ** 4 (Crim. Ct, Kings County 2020). In a motion to dismiss, the Defendant need only show that the Prosecution was not ready for a hearing or trial, on the record or with sufficient notice to Defense Counsel, within the time period specified in the C.P.L. The accusatory instrument must then be dismissed unless the People establish statutory periods of exclusion that justify the delay and bring the Prosecution within the statutory period. *See*, C.P.L. §30.30(4); *People v. Berkowitz*, 50 N.Y.2d 333 (1980); *People v. Dean*, 45 N.Y.2d 651 (1978); *People v. Hawkins*, 79 A.D.2d 743 (1980).

In this case, the People have filed an illusory Certificate of Readiness and Certificate of Compliance. The People cannot be ready for trial based on the jurisdictional and facial insufficiencies in the accusatory instrument. While these insufficiencies can be cured, the

Prosecution must annex and affix a proper accusatory instrument within ninety days of the start of the case, which has not occurred in this case. Additionally, the Prosecution filed improper certifications in this case; therefore, any declaration of readiness made on the record was based on an improper Certification of Compliance and Readiness.

The laws around the new discovery requirements are still developing; however, the Nassau County District Court has now repeatedly held that Defense Counsel cannot meaningfully consent to an adjournment if the consent is based on an erroneous belief that the Prosecution complied with all discovery requirements. *See People v. Ramon Flores*, *4 (Dist. Ct, Nassau County, November 19, 2021, Engel, A., Docket No. CR- 011324-20NA), attached hereto as Exhibit C; *People v. Laclair*, *8 (Dist. Ct. Nassau County, September 22, 2021, O'Donnell, C., Docket No. Cr-010539-20NA), attached hereto as Ex. C (finding that the "erroneous belief" that the People were compliant meant that the Defense Counsel could not "meaningfully request or consent" to adjournments). In this case, any adjournments that Defense Counsel consented to were based on the improper belief that the Prosecution was actually and immediately ready for trial with a proper and adequate accusatory instrument.

**c. <u>Under C.P.L. § 30.30(5-a), the prosecution's statement of readiness was invalid due to the defects in the accusatory instrument.</u>**

Criminal Procedure Law section 170.30(1)(a) provides that an information may be dismissed if "it is defective within the meaning of section 170.35." Pursuant to C.P.L § 30.30(5-a), a Certificate of Readiness "shall not be valid unless the prosecuting attorney certifies that all counts charged in the accusatory instrument meet the requirements of sections 100.15 and 100.40 of this chapter and those counts not meeting the requirements of sections 100.15 and 100.40 of this chapter have been dismissed." C.P.L. 30.30(5-a).

Upon filing a Certificate of Readiness and a Certificate of Compliance, the Prosecution must actually be ready for trial in order for the announcement of readiness to be effective. *People v. Brown*, 28 NY3d 392 (2016). Readiness means that the Prosecution has completed everything required to bring the case to trial "immediately." *People v. Robinson*, 171 AD2d 475, 477 (1st Dept 1991); *People v. England*, 84 N.Y. 2d 1, 4 (1994); *People v. Kendzia*, 64 N.Y. 2d 331, 337 (1985). The readiness requirement was added by legislature to abrogate the prior practice by the prosecution of consistently declaring ready for trial with facially insufficient counts included in the accusatory instrument. *Ramon Flores*, *4 (Engel, A.) Ex. C. The legislature intended to provide the prosecution with a "bright-line rule" as to when the District Attorney can answer ready for trial. *Id. quoting People v. Young*, 72 Misc. 3d 1203(A) (Crim. Ct. N.Y. Co. 2021) (holding the People had not met their burden for trial readiness when the accusatory instrument remained facially insufficient) (vacating the People's Certificate of Compliance as illusory).

Prior to January 1, 2020, it was up to the Defense to challenge the sufficiency of an accusatory instrument; "now, under C.P.L. § 30.30(5-a), it is the burden of the People to prove the sufficiency of each count of the information." *People v. Ramirez-Correa*, 2021 NY Slip. Op. 21040 (Crim Ct. Queens County, Feb. 25, 2021); *People v. Lavrik*, (Crim. Ct. NY County, April 22, 2021, Maldonado-Cruz, J., Docket No. Cr-033832-19NY).

In the present case, it has been more than ninety days since the start of the case and the accusatory instrument remains insufficient. On December 16, 2021, Mr. XXXXXXX was arraigned on the charge. The People were not compliant with their discovery obligations and were not ready for trial on that date. At that time, the case was adjourned to January 11, 2022 for discovery compliance at the People's request. The defense did not consent to this adjournment. Therefore, **twenty-six (26)** days are chargeable to the People.

On January 11, 2022, the People were not compliant with their discovery obligations and were not ready for trial. At that time, the case was adjourned to February 28, 2022 for discovery compliance at the People's request. The Defense did not consent to this adjournment. Therefore, **forty-eight (48)** days are chargeable to the People.

According to the Court's file, the Prosecution filed their Certificate of Readiness and Certificate of Compliance on February 9, 2022. The Prosecution also represented to the Court that it filed Certificates on February 9, 2022. However, the District Attorney could not have been ready on that date due to the multiple defects in the accusatory instrument. Additionally, Defense Counsel was not served a Certificate of Readiness nor a Certificate of Compliance, and remains not in receipt of a Certificate of Readiness and Compliance. On the next court date, February 28, 2022, Defense Counsel consented to an adjournment for a Mapp, Huntley, Henshaw, Dunaway Hearing based on the presentation by the Prosecutor that he was indeed ready for trial and had completely complied with his discovery obligations. The case was adjourned to March 30, 2022 for the hearings. Defense Counsel consented to the adjournment as it was the Defense's request to proceed to hearings on this case; however, the consent was based on an incorrect belief that the Prosecution filed proper certificates. The Prosecution has made no effort to correct the certification in the time between certifying and the date of Defense Counsel filing this motion. As the certification was improper and illusory, upon filing this motion an additional **eighteen (18)** days are chargeable to the People.

As per the previously stated insufficiencies in the accusatory instrument, the People's Certificate of Readiness and Certificate of Compliance are invalid. Therefore, as of the date of this filing (March 18, 2021) the People still are not compliant with their discovery obligations and are not ready for trial. Cumulatively, **ninety-two (92) days of speedy trial time is**

**chargeable to the People** in the above-captioned action from December 16, 2021 until March 18, 2022. This exceeds the 90-day time limit the People are given by C.P.L. §30.30(1)(b) to be ready to proceed to trial on an A misdemeanor, or its equivalent. There are no statutory periods of exclusion to which the People can point to justify their delay in commencing the prosecution of Mr. XXXXXXX. For those reasons, it is respectfully submitted that this court dismiss the case on the ground that the Defendant has been denied his statutory right to a speedy trial under CPL §30.30(5-a).

**b. <u>Under C.P.L. § 30.30, The Prosecution's Statement Of Readiness and Compliance Was Invalid Due To The Failure To Comply With All Discovery Obligations.</u>**

As stated above, the Prosecution must be actually and immediately ready for trial upon filing a Certificate of Readiness and Compliance. *Brown*, 28 N.Y. 3d at 392. The Prosecution cannot be ready for trial if the prosecution has not adequately complied with its discovery obligations. *Ramon Flores*, *4 (2021); *Laclair*, *8 (2021); Ex. C. An illusory certification allows the Prosecution to continue the practice of trial by surprise, which the reforms to the discovery laws in 2020 expressly sought to end. By not providing an Automatic Discovery Form, a list of all the discovery provided, or any indication of who would be testifying at trial, the Prosecution created an inherent trial by surprise scenario. Additionally, the Prosecution's discovery openly alludes to the existence of evidence like radio runs, CAD reports, and Mobile Data Transmissions, and yet the Prosecution did not provide these items to Defense Counsel.

In the instant case, the time charged, as outlined above, is beyond the ninety-day requirement under C.P.L. § 30.30. There are no statutory periods of exclusion to which the People can point to justify the delay in complying with discovery requirements within the ninety days allotted. For the reasons outlined above, due to the Prosecution's failure to comply with the

discovery statute, it is respectfully submitted that this Court dismiss the case on the ground that Mr. XXXXXXX has been denied his statutory right to a speedy trial under C. P. L. §30.30(1)(b).

## IV. RESERVATION OF RIGHTS

Mr. XXXXXXX respectfully reserves the right, pursuant to C.P.L. §§ 255.20(2) and (3), to make further motions based upon information now unknown to the defense but revealed by the prosecution's additional discovery, the Court's decision as to the instant motions, and any further developments in this case. Defendant reserves the right to be prosecuted only pursuant to a legally sufficient misdemeanor Information. Defendant does not waive that right by filing this motion. *People v. Weinberg,* 34 N.Y.2d 429 (1974).

WHEREFORE, the defendant respectfully requests this Court to grant the relief sought herein and reserve to defendant the right to amend or supplement this motion for such other and further relief as this Court may deem just and proper.

## Applicant Details

| | |
|---|---|
| First Name | **Adina** |
| Last Name | **Hemley-Bronstein** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **ahemleybronstein@gmail.com** |
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| Contact Phone Number | **6173047024** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Yale University** |
| Date of BA/BS | **June 2014** |
| JD/LLB From | **Yale Law School**<br>**https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf** |
| Date of JD/LLB | **June 2, 2021** |
| Class Rank | **School does not rank** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Yale Journal of Law & Feminism** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

| | |
|---|---|
| Specialized Work Experience | **Appellate, Immigration, Prison Litigation** |

## Recommenders

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**ADINA HEMLEY-BRONSTEIN**

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The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

June 11, 2023

Dear Judge Matsumoto:

I am a graduate of Yale Law School's class of 2021 and a second-year Litigation Associate at Jenner & Block LLP in New York. I am writing to apply for a clerkship beginning in 2025. My current job permits me to begin a position "off-cycle."

Your impressive public service and criminal law background draws me to this opportunity. My work in deportation defense is the reason I became a lawyer. At Jenner, I have dedicated substantial time to pro bono matters including a Second Circuit immigration appeal, an amicus brief supporting the appeal of a criminal sentence, and a state criminal appeal. In two to four years, I plan to transition to a public interest career. I am interested in positions in a state government's civil rights division or alternatively at a small private firm with robust civil rights and criminal law practices. Your government experience makes me especially excited at the prospect of serving as one of your judicial clerks.

I am confident that my experiences before and since law school prepare me for the demands of a district court clerkship. At Jenner, I have become a more efficient and precise legal researcher and writer. I have also become familiar with the culture of a federal district court by coordinating my firm's participation in SDNY's Reentry Through Intensive Supervision and Employment ("RISE") program. Finally, at Jenner, I have learned to appreciate the facts: As the most junior member of my case teams, it is my job to know the record inside and out and to alert partners to specific facts that may bolster or undermine our case. In this role, I have learned to balance meticulous attention to detail with the ability to think conceptually and creatively about our case theories and strategy. These skills and experiences, along with my work ethic and eagerness to learn all I can about the intricacies of litigation, prepare me to hit the ground running and quickly become a valuable member of your chambers.

It would be a privilege to speak with you about this role. I would welcome the opportunity to meet in-person. Thank you for considering my application.

Sincerely,

Adina Hemley-Bronstein

# ADINA HEMLEY-BRONSTEIN

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## EDUCATION

**Yale Law School**, New Haven, CT J.D., May 2021
Experience: Clinic Member, Prof. Miriam Gohara (Challenging Mass Incarceration Clinic)
Research Assistant, Prof. Reva Siegel (equal protection arguments for abortion access)
Research Assistant, Prof. Monica Bell (consequences of stop-and-frisk policing)
Teaching Assistant, Prof. Robert Harrison (Advanced Legal Writing)

**Yale University**, New Haven, CT B.A., May 2014
Major: American Studies with Honors
Honors: Phi Beta Kappa; *Magna cum laude*

## PROFESSIONAL EXPERIENCE

**Jenner & Block LLP**, New York, NY 11/2021–Present; 6/2020–7/2020
*Litigation Associate*
- Participate in all aspects of complex commercial litigation and internal investigations.
- Manage document review, respond to discovery requests, and interview witnesses.
- Draft pleadings, motions, and briefs (*e.g.*, complaint, motion to dismiss, and Second Circuit brief).
- Serve on firm's Pro Bono Committee and provide pro bono legal assistance through Judge Denny Chin's Reentry Through Intensive Supervision and Employment ("RISE") Court.

**Prisoners' Legal Services of Massachusetts**, Boston, MA 6/2019–8/2019
*Legal Intern*
- Supported class action lawsuit challenging involuntary civil commitment law.
- Interviewed prisoners in English and Spanish about conditions of confinement.

**Bar Association of San Francisco**, San Francisco, CA 9/2017–7/2018; 10/2014–11/2015
*Pro Bono Deportation Defense Coordinator*
- Coordinated pro bono counsel for 80 individuals/week at initial deportation hearings.
- Created regional referral system to connect clients with pro bono deportation defense.

**Mission Asset Fund**, San Francisco, CA 8/2016–9/2017
*Communications Associate*
- Wrote keynote speeches and articles for CEO José Quiñonez.
- Crafted talking points on organization's mission of helping clients build financial security.

**UC Berkeley Psychology Department**, Berkeley, CA 2/2016–8/2016
*Research Coordinator*
- Coordinated clinical trial on effectiveness of sleep therapy for adults with severe mental illness.

**Immigration Law Office of Robert B. Jobe**, San Francisco, CA 3/2014–9/2014
*Bilingual (Spanish/English) Paralegal*
- Prepared applications for green cards, citizenship, asylum, and other forms of relief.

## LANGUAGE

Spanish – Proficient

# YALE LAW SCHOOL
**Office of the Registrar**

# TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 13-APR-2023

Record of: Adina Hemley-Bronstein Page: 1
Issued To: Adina Hemley-Bronstein
Parchment DocumentID: TWCPCZPP

Date Entered: Fall 2018

Degree Awarded : Juris Doctor 04-JUN-2021

| SUBJ | NO. | COURSE TITLE | UNITS | GRD | INSTRUCTOR |
|---|---|---|---|---|---|
| **Fall 2018** | | | | | |
| LAW | 10001 | Constitutional Law I:SectionB | 4.00 | CR | R. Siegel |
| LAW | 11001 | Contracts I: Group 2 | 4.00 | CR | H. Hansmann |
| LAW | 12001 | Procedure I: Section B | 4.00 | CR | H. Koh |
| LAW | 13001 | Torts I: Section C | 4.00 | CR | J. Witt |
| | | Term Units 16.00 | Cum Units 16.00 | | |
| **Spring 2019** | | | | | |
| LAW | 21027 | Advanced Legal Research | 2.00 | H | J. Nann |
| LAW | 21233 | Criminal Law | 3.00 | H | G. Yaffe |
| LAW | 21277 | Evidence | 4.00 | H | S. Carter |
| LAW | 21426 | CapPunshmnt:Race,Poverty,Disad | 4.00 | P | S. Bright |
| | | Term Units 13.00 | Cum Units 29.00 | | |
| **Fall 2019** | | | | | |
| LAW | 20037 | Employment Discrimination Law | 4.00 | P | V. Schultz |
| LAW | 20219 | Business Organizations | 4.00 | P | J. Macey |
| LAW | 20300 | ProfessResponsiblityLegEthics | 3.00 | H | R. Little |
| LAW | 30135 | ChallengingMassIncarcerationCl | 2.00 | H | M. Gohara, K. Barrett |
| LAW | 30136 | ChallengMassIncarcerationFldwk | 2.00 | H | M. Gohara, K. Barrett |
| | | Term Units 15.00 | Cum Units 44.00 | | |
| **Spring 2020** | | | | | |
| LAW | 21017 | Property | 4.00 | CR | T. Zhang |
| LAW | 21601 | Administrative Law | 4.00 | CR | N. Parrillo |
| LAW | 30146 | AdvChallengMassIncarcCl:Fldwk | 2.00 | CR | M. Gohara |
| LAW | 30198 | Complex Civil Litigation | 2.00 | CR | S. Underhill |
| | | Substantial Paper | | | |
| | | Term Units 12.00 | Cum Units 56.00 | | |

Spr2020 YLS classes completed after 3/6/20 graded only on a CR/F basis due to COVID-19.

| | | | | | |
|---|---|---|---|---|---|
| **Fall 2020** | | | | | |
| LAW | 20032 | Advanced Legal Writing | 2.00 | H | R. Harrison |
| LAW | 20066 | Legislation | 3.00 | H | A. Gluck |
| LAW | 20359 | Crim Pro:Charging&Adjudic | 4.00 | H | K. Stith |
| LAW | 20546 | Constl&CivRtsImpactLitigation | 2.00 | H | L. Guttentag |
| LAW | 40001 | Supervised Research | 2.00 | H | R. Siegel |
| LAW | 50100 | RdgGrp:Progressive Scholarship | 1.00 | CR | R. Siegel |
| | | Term Units 14.00 | Cum Units 70.00 | | |

Sup. Research: Abortion Litigation Strategies After June Medical Services v. Russo.

| | | | | | |
|---|---|---|---|---|---|
| **Spring 2021** | | | | | |
| LAW | 21124 | Federal and StateCourts/FedSys | 4.00 | H | J. Resnik |
| LAW | 21209 | International Business Trans. | 4.00 | H | A. Chua |

********** CONTINUED ON PAGE 2 **********

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed.

# YALE LAW SCHOOL
**Office of the Registrar**

# TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 13-APR-2023

Record of: Adina Hemley-Bronstein
Level: Professional: Law (JD)



| SUBJ | NO. | COURSE TITLE | UNITS | GRD | INSTRUCTOR |
|---|---|---|---|---|---|
| Institution Information continued: | | | | | |
| LAW | 21429 | Race, Inequality, Law: DirRes Supervised Analytic Writing | 4.00 | H | M. Bell |
| LAW | 21448 | Crim Procedure: Investigations | 3.00 | H | M. Baer |
| | | Term Units 15.00 Cum Units 85.00 | | | |

********** END OF TRANSCRIPT **********

LEG. SCHOL. YALENS. NOV. PORT. FIAT VERITAS LUX ANN. DOM. MDCCCXXV. CONDIT.

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed.

**YALE LAW SCHOOL**
P.O. Box 208215
New Haven, CT 06520

## EXPLANATION OF GRADING SYSTEM

*Beginning September 2015 to date*

| | |
|---|---|
| **H**ONORS | Performance in the course demonstrates superior mastery of the subject. |
| **P**ASS | Successful performance in the course. |
| **L**OW **P**ASS | Performance in the course is below the level that on average is required for the award of a degree. |
| **CR**EDIT | The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis. |
| **F**AILURE | No credit is given for the course. |
| **CRG** | Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement. |
| **RC** | Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union. |
| **T** | Ungraded transfer credit for work done at another law school. |
| **TG** | Transfer credit for work completed at another law school; counts toward graded unit requirement. |
| **EXT** | In-progress work for which an extension has been approved. |
| **INC** | Late work for which no extension has been approved. |
| **NCR** | No credit given because of late withdrawal from course or other reason noted in term comments. |

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

*For Classes Matriculating 1843 through September 1950*

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

*For Classes Matriculating September 1951 through September 1955*

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

*For Classes Matriculating September 1956 through September 1958*

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

*From September 1959 through June 1968*

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

*From September 1968 through June 2015*

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Today is my birthday, but I come bearing a gift for you: Adina Hemley-Bronstein, Yale Law School Class of 2021, who is applying for a clerkship in your chambers. This year, I am recommending five very talented current Yale Law School students for clerkships —but Adina is hands down my top pick. She ranks with the five best students I have taught (several of whom clerked at the U.S. Supreme Court) in my over thirty years at Yale.

In the fall of 2020, Adina took my course "Advanced Legal Writing," and she may be using one of the assignments as her writing sample. If so, her memo will show you all you need to know about how well she analyzes statutes and cases, applies the law to the facts, and crafts sentences. I have been giving this same memo assignment for several years, and again, Adina's is among the very best, if not the best, memo on the topic that I have ever received. She richly deserved the Honors she earned as a final grade.

In the spring of 2021, when I taught an expanded version of the course, I asked Adina to be one of my teaching assistants. Her job was to confer with eight of the thirty-two students on their memos and a brief-revision exercise. One of her charges said that his time with her (nearly three hours) "was probably one of the most useful writing education experiences of my life. What a gift!" So Adina is not only an excellent legal writer, she also excels at improving other writers' drafts. Those talents will make her a great clerk, co-clerk, and partner for you. What a gift!

And finally: Adina is a spectacular person: kind, considerate, generous, hard-working, and brilliant. I'm confident that if you interview her because of how she looks on paper, you will very likely offer her a clerkship because of how she is as a person. And if you do invite Adina to join your clerkship family, I promise you will be congratulating yourself for years to come that you decided to do so.

Sincerely,

Robert D. Harrison, J.D., Ph.D.

Robert Harrison - robert.harrison@yale.edu - 203-432-7647

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to enthusiastically recommend Adina Hemley-Bronstein for a clerkship in your Chambers. I have been fortunate to know Adina since her time as a summer associate here at Jenner & Block LLP, where I am a litigation partner in our firm's New York office. Following graduation in 2021, Adina came back to Jenner as a full-fledged litigation associate. In her brief time here, Adina has established herself as one of the most promising, talented, and well-liked junior associates we have seen in quite some time (and I have been here for 16 years, so I have worked with dozens of strong incoming associates).I write to enthusiastically recommend Adina Hemley-Bronstein for a clerkship in your Chambers. I have been fortunate to know Adina since her time as a summer associate here at Jenner & Block LLP, where I am a litigation partner in our firm's New York office. Following graduation in 2021, Adina came back to Jenner as a full-fledged litigation associate. In her brief time here, Adina has established herself as one of the most promising, talented, and well-liked junior associates we have seen in quite some time (and I have been here for 16 years, so I have worked with dozens of strong incoming associates).

Three things stand out most about Adina. First, she is an extraordinarily capable attorney, especially considering that she was wrapping up law school only two years ago. While there are understandable professional growing pains for attorneys transitioning into their first role, Adina has been a rare exception. I have worked closely with her on multiple matters, and it never ceases to amaze me how she performs as though she has been a practicing attorney for years. This shines through all facets of her work. For example, Adina's writing is crisp, to-the-point, and forceful. You know exactly what she means to convey and what the key points are. Likewise, many junior associates overlook how critically important the facts are to the cases we work on. Adina is the opposite. She gets it. Litigation starts with the facts, ends with the facts, and has the facts sandwiched in between. Adina seems to revel in plumbing for the facts in our cases—digging through documents, interviewing witnesses, reading between the lines of the opposition's discovery responses—instinctively understanding that whatever the law, the facts will drive outcomes of trial court litigation.

Second, Adina is noticeably poised and professional. On one matter she and I worked on together from its inception, Adina was present for all client meetings and witness interviews. Not just present, but a full participant. The client's in-house attorney with whom we worked most closely on the matter forgot multiple times that Adina was, at the time, a first-year associate. This was thanks to her maturity and sound judgment. It enabled me to allow Adina to work directly with the client without my close involvement at all steps of the way. I do not think I had ever given this kind of autonomy to a first-year associate. I certainly would not have trusted myself with such responsibility when I was at that stage in my career. Adina trusted herself—as she should have—and she showed eagerness to gain the experience, which is terrific.

Third, Adina is simply a wonderful person. Much of the personal rapport we establish with our colleagues has been best lost to the pandemic, as I am sure you have observed. And Adina spent a good chunk of law school remote. Same with our summer program and the start to her career. But Adina has managed to build strong relationships with so many of her colleagues—partners, associates, firm staff—despite this. She is endlessly affable, thoughtful, good-humored, and "real"—qualities in our co-workers that perhaps we have taken for granted in the past, but that stand out now because it has been difficult to get to know one another these past three years. Having been a happy member of an amazing clerkship family at the outset of my career (I clerked for The Honorable Naomi Reice Buchwald in 2003-04), I know the importance of chemistry in chambers. I have no doubt that Adina will be a fine addition to yours from this standpoint.

I could go on, and would be happy to should you care to hear more. Jenner has a proud and prodigious tradition of hiring judicial law clerks and encouraging associates who have not had the experience to try to gain it. Though I would be sad for Adina to leave us, I know that doing so would benefit her and our judiciary.

Sincerely,
Brian Fischer

Brian Fischer - bfischer@jenner.com - 6465288799

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write enthusiastically to recommend Adina Hemley-Bronstein, a recent graduate of Yale Law School who is applying for a clerkship in your chambers. Adina has the smarts, drive to deliver, and the cluster of social skills to make an excellent clerk.

I worked with Adina in two capacities in her third year of law school. She wrote paper on the evolution of the undue burden standard examining the ways that its application by (some) judges is sensitive to the ways that poverty can exacerbate the burden of abortion restrictions. She was forthright in reporting on the state of the law, yet at the same time demonstrated perseverance and creativity in finding whatever case law there was to find on point.

The research assistance she performed was also on reproductive justice themes. In the fall, when I was writing on June Medical, Adina tracked all district and circuit court opinions citing the decision and charted the debate over "Marks"-- the emerging circuit split regarding the precedential effect of Chief Justice Roberts's concurrence. During the spring semester, Adina worked with another student to prepare a memorandum identifying various equality arguments relevant to congressional debate of the Women's Health Protection Act (WHPA). This project required organizing a wide array of case law, statutory text, academic literature, and empirical scholarship to support five distinct equality arguments in favor of the WHPA. She worked to distill these complex legal arguments into succinct, accessible language appropriate for an audience of policymakers and practitioners. In this work she demonstrated that she has strong research skills and writes cleanly and effectively.

A few words about Adina's trajectory that seem relevant to reading her transcript. My understanding is that Adina was out of school for four years before law school. It seems that Adina took a bit of time to adapt to returning to school, and when she did she earned solid honors in her last year of law school. (Adina also mentioned that Professor Judith Resnik selected her final Federal Courts exam as one of ten to share with the class as a sample.).

Adina looks to the clerkship as a chance to gain mentorship and learn about litigation. I believe that Adina plans to go into private practice as a litigator before returning to some form of public interest practice.

I urge you to interview Adina for a position in your chambers. It has been my great pleasure to work with her this year and I believe that when you talk to her you will see in an instant how she would bring light and deep intelligence to your chambers. If I can be of assistance in your decision, please do not hesitate to email or call me on my cell at 203-668-6181.

Sincerely,

Reva Siegel

Reva Siegel - reva.siegel@yale.edu - 203-432-6791

**ADINA HEMLEY-BRONSTEIN**

228 Saint Johns Place | Brooklyn, NY 11217 | ahemleybronstein@gmail.com | (617) 304-7024

## Writing Sample #1

I wrote the attached memorandum for "Advanced Legal Writing" taught by Professor Robert Harrison in Fall 2020 during my 3L year. Based on my performance on this assignment, Professor Harrison selected me to serve as a Teaching Assistant for his course and conduct individual writing conferences with second-year law students. This writing sample reflects my independent work.

**MEMORANDUM**

TO: Attorney Rob Harrison

FROM: Adina Hemley-Bronstein

DATE: November 7, 2020

RE: Applicability of Article 2 to Helio Contract

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**ISSUE**

This memorandum analyzes whether Article 2 of the Illinois Commercial Code applies to a contract between our client Helio Turbo & Diesel AB ("Helio") and American pharmaceutical company Novelo, Inc. ("Novelo"). Helio sold Novelo a diesel generator, engine, and auxiliary equipment ("diesel-generator set" or "Equipment"). The contract, as amended by a Contract Change Order (collectively, the "Agreement"), also required Helio to design, manufacture, deliver, and install the diesel-generator set. Novelo now seeks damages related to alleged Equipment defects. Article 2 governs "transactions in goods," which include contracts either exclusively or predominantly for goods. Does Article 2 apply to this Agreement?

**BRIEF ANSWER**

The Agreement likely falls under Article 2 because the diesel-generator set is a "good" and because its sale forms the contract's "predominant purpose." First, the Equipment qualifies as a good because it was movable at the time of identification. Second, the Equipment sale forms the contract's predominant purpose because the Agreement: (A) labels the parties "Purchaser" and "Seller"; (B) includes a warranty on the Equipment; (C) transfers title from Helio to Novelo; and (D) frames all services as necessary to supplying the diesel-generator set, which formed the "heart" of the deal.

**STATEMENT OF ASSUMED FACTS**

Our client Helio is a Swedish manufacturer of diesel generators. Helio entered the Agreement with Novelo to supply a diesel-generator set. Novelo Facts ¶ 24. The diesel-generator set would be the "principal equipment item" for a new cogeneration facility to power Novelo's manufacturing plant in

Barceloneta, Puerto Rico. *Id.* ¶ 9. Novelo is now suing Helio for damages related to the Equipment that Helio supplied.

The Agreement, which referred to Novelo and Helio as "Purchaser" and "Seller" throughout the document, emphasized Helio's "experience, capability, and expertise to design and fabricate generation equipment." Agreement ¶ 1. Novelo corroborated that it selected Helio because Helio had "manufactured similar equipment" in the past. Novelo Facts ¶ 16. The Agreement required Helio to design, fabricate, test, deliver, and sell the diesel-generator set to Novelo. Agreement ¶ 2. It also required Helio to provide technical assistance during Novelo's initial operation of the Equipment. *Id.* Although the Agreement originally required Novelo to install the Equipment, *id.* ¶ 8(a), a "Contract Change Order" amended the Agreement and obligated Helio "to install the diesel-generator set." Novelo Facts ¶ 35. To design the Equipment, Helio would follow custom specifications, attend in-person design meetings, communicate monthly with Novelo's Project Engineer, and consult Novelo about "all significant design options." Agreement ¶ 4. While the Agreement required Helio to deliver the Equipment to Novelo's factory, *id.* ¶ 6, it required Novelo to "obtain, at its expense, all necessary state and local permits." *Id.* ¶ 8. Upon delivery, "[t]itle to the equipment" would pass to Novelo. *Id.* ¶ 6(d).

Under the Agreement, Helio warranted that the Equipment would "be free from defects in material, workmanship and design." *Id.* ¶ 10(a). The warranty required Helio to replace or repair defective parts but did not extend to "defects in installations outside the equipment." *Id.* ¶ 10(c). An addendum added that the "Contractor (i.e., Helio)" was responsible for the "trouble[-]free operation of the generator set." Novelo Facts ¶ 26. Helio also agreed to provide twelve months of technical assistance between delivery and Novelo's final acceptance of the Equipment. Agreement ¶ 8(d). The twelve months of assistance were "[i]ncluded in the price of the Equipment," *id.*, which served as "total consideration" for both "Equipment and services." *Id.* ¶ 3. The Agreement permitted Novelo to pay in installments. *Id.* For example, Novelo would pay a percentage of the total price when Helio submitted drawings and designs, completed "Engine Factory Testing," and passed the "Equipment title" to Novelo. *Id.* The Agreement established that if Novelo terminated the contract, Novelo could "tak[e] title and possession of all

materials and all designs." *Id.* ¶ 25. Novelo could also "tak[e] title to any . . . work in progress" if Helio breached the contract. *Id.* ¶ 27(a).

After Helio manufactured the diesel-generator set, Helio shipped the unassembled Equipment parts to Novelo's factory. *Id.* ¶¶ 37-40; Agreement ¶ 3 (describing Helio's "[d]elivery of crankshaft and rotor shaft to assembly location"). After delivery, Helio installed the diesel-generator set. *Id.* ¶ 40.

This memorandum analyzes whether Article 2 of the Illinois Commercial Code governs the Agreement.

## APPLICABLE STATUTES

**810 Ill. Comp. Stat. 5/2-102 (2020). Scope . . .**

. . . [T]his Article applies to transactions in goods . . . .

**810 Ill. Comp. Stat. 5/2-103 (2020). Definitions . . .**

> (1)(a) "Buyer" means a person who buys or contracts to buy goods.
>
> . . .
>
> (1)(d) "Seller" means a person who sells or contracts to sell goods.
>
> . . .

**810 Ill. Comp. Stat. 5/2-105 (2020). Definitions . . .**

> (1) "Goods" means all things . . . which are movable at the time of identification to the contract for sale. . . .
>
> (2) . . . Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

**810 Ill. Comp. Stat. 5/2-106 (2020). Definitions . . .**

> (1) . . . "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price. . . .

**810 Ill. Comp. Stat. 5/2-501 (2020). Insurable Interest in Goods; Manner and Identification of Goods**

> (1) . . . [I]dentification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
>
> (a) when the contract is made if it is for the sale of goods already existing and identified;
>
> (b) if the contract is for the sale of future goods . . . , when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers . . .

**DISCUSSION**

Article 2 will govern Helio and Novelo's Agreement if (I) the Equipment satisfies Article 2's definition of "goods," and (II) the sale of goods, rather than the rendition of services, forms the Agreement's "predominant purpose."

I. Whether the Equipment is a "Good"

Article 2 only governs "transactions in goods." 810 Ill. Comp. Stat. 5/2-102 (2020). It applies to both present and "future" goods, which are goods not yet "existing and identified." *Id.* 5/2-105(2); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 580 n.6 (7th Cir. 1976) ("Nor does the fact that the goods are not in existence at the time of the execution of the contract change their status as goods."). Goods are "all things . . . movable at the time of identification." 810 Ill. Comp. Stat. 5/2-105(1) (2020). In a contract for future goods, identification occurs "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." *Id.* 5/2-501(b).

The diesel-generator set almost certainly constitutes goods under Article 2. The Agreement was a contract for future goods because it required Helio to "design and fabricate" objects that did not yet exist. Agreement ¶ 1. Therefore, identification occurred no later than when Helio "shipped" the Equipment to Novelo's manufacturing plant. 810 Ill. Comp. Stat. 5/2-501(b) (2020). Because the diesel-generator set was capable of being "shipped," it was necessarily "movable" at the time of identification and therefore is a good under Article 2.

Illinois courts have clarified that to satisfy the definition of Article 2 goods, items need only be "movable *at the time of identification*." *Id.* 5/2-105(1) (emphasis added). Therefore, items qualify as movable goods even if they become immovable after assembly or installation. *Meeker v. Hamilton Grain Elevator Co.*, 442 N.E.2d 921, 923 (Ill. App. 1982) (pieces of heavy steel grain bins were movable goods, despite ultimately being "bolted to . . . concrete pads," because identification occurred before assembly); *accord Bonebrake v. Cox*, 499 F.2d 951, 958 n.12 (8th Cir. 1974) (sections of bowling lanes were movable goods because identification occurred before installation).

Thus, the diesel-generator set qualifies as a good even if it became immovable once assembled or installed. Under the Agreement, Helio delivered unassembled components of the Equipment to Novelo's factory, much like the movable grain bin pieces and bowling lane sections in *Meeker* and *Bonebrake*. Agreement ¶ 3 (describing Helio's "[d]elivery of crankshaft and rotor shaft to assembly location"). As in *Meeker* and *Bonebrake*, the Equipment therefore qualifies as a good even if it became immovable once Helio installed it because it was movable at the time of identification.

II. Whether the Sale of Goods Forms the Agreement's "Predominant Purpose"

Helio not only sold Novelo the diesel-generator set but also agreed to design, manufacture, deliver, and install it. Agreement ¶¶ 4-8. Therefore, the Agreement involved both goods and services. Article 2 governs contracts that mix goods and services only if the sale of goods is the "predominant purpose." *Meeker*, 442 N.E.2d at 922. To determine a contract's "predominant purpose," Illinois courts apply the following test:

> The test for inclusion or exclusion is not whether [the contracts] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . .

*Id.* (quoting *Bonebrake*, 449 F.2d at 960). The predominant-purpose test is a holistic, fact-specific inquiry. *Bob Neiner Farms v. Hendrix*, 490 N.E.2d 257, 259 (Ill. App. 1986) (evaluating predominant purpose by "consider[ing] . . . all the facts"). Though no single factor is dispositive, Illinois courts frequently find that goods predominate in contracts that: (A) label the parties "Purchaser" and "Seller"; (B) include a warranty for materials defects; (C) transfer title in the equipment from seller to buyer; and (D) frame the goods as the "heart" of the agreement.

A. *Party Terms*

Illinois courts consistently hold that transactions are predominantly for goods where the contract labels the parties "purchaser" (or "buyer") and "seller." *Meeker*, 442 N.E.2d at 922-23. This inference aligns with Article 2's text, which includes definitions for "buyer" and "seller." 810 Ill. Comp. Stat. 5/2-103(1)(a), (d) (2020). In *Meeker*, the court concluded that a contract to build two grain bins was

predominantly for goods because it referred to the parties as "Purchaser" and "Seller." 442 N.E.2d at 922-23. By contrast, in *Nitrin*, the court held that a contract to design and build an ammonia plant was predominantly for services, in part because "throughout the contract plaintiff [was] denominated 'Owner' not buyer, and defendant [was] denominated 'Contractor' not seller." *Nitrin, Inc. v. Bethlehem Steel Corp.*, 342 N.E.2d 65, 78 (Ill. App. 1976); *accord Boddie v. Litton*, 455 N.E.2d 142, 145 (Ill. App. 1983) (contract was predominantly for services where the parties included "general contractor" and "subcontractor"); *J & R Elec. Div. of J.O. Mory Stores, Inc. v. Skoog Constr. Co.*, 348 N.E.2d 474, 475 (Ill. App. 1976) (contract was also predominantly for services where the parties included "contractor," "subcontractor," and "owner").

Like the contract in *Meeker* and unlike the contracts in *Nitrin*, *Boddie*, and *J & R Electric*, the Agreement refers to Novelo and Helio as "Purchaser" and "Seller," suggesting a contract predominantly for goods. *See, e.g.*, Agreement ¶ 1. Admittedly, one line in an addendum refers to the "Contractor (i.e., Helio)." Novelo Facts ¶ 26. But the Agreement otherwise contains over 100 references to Helio as "Seller," including in the Agreement's opening paragraph and on 24 of the contract's 30 pages. *See* Agreement ¶¶ 1-15, 25-31; Exhibits B, C. Given their prevalence and prominence, the terms "Seller" and "Purchaser" are persuasive evidence that goods constituted the predominant purpose of Helio's contract with Novelo.

B. *Warranty*

When mixed contracts contain a warranty, Illinois courts applying the predominant-purpose test consider whether the warranty runs to the goods or to the services. *Tivoli Enters., Inc. v. Brunswick Bowling and Billiards Corp.*, 646 N.E.2d 943, 948 (Ill. App. 1995). In *Tivoli*, a contract for bowling lanes was predominantly for goods because it contained a warranty against "defects in materials and workmanship" that "[ran] to the goods" and not the services. *Id.*; *accord Bonebrake*, 499 F.2d at 958 (characterizing a warranty against "defects in workmanship and materials" as language "peculiar to goods, not services"). By contrast, *Nitrin* concluded that an ammonia plant contract was predominantly for services because the warranty applied not to any tangible materials but only to "field construction"

and "design work." 342 N.E.2d at 68; *id.* at 72 n.5 (noting that the "guarantee of defect[-]free field workmanship applies only to construction work done at the . . . plant site").

Like the contracts in *Tivoli* and *Bonebrake*, the Agreement is probably a contract predominantly for goods because the warranty runs to the Equipment, not to the services. Like the *Tivoli* and *Bonebrake* warranties against defects in "materials" and "workmanship," the Agreement's warranty establishes that the "Equipment will be free from defects in material, workmanship and design." Agreement ¶ 10(a). And in contrast to the *Nitrin* warranty, which applied not to materials but only to "field construction," the Agreement's warranty covers "defective parts" but does not extend to defects "outside the equipment." *Id.* ¶ 10(c). Therefore, the Agreement's warranty provisions run to the Equipment and provide further proof of a contract predominantly for goods.

C. *Title*

Illinois courts have concluded that contracts are predominantly for goods when they transfer title from seller to buyer. *Meeker*, 442 N.E.2d at 924. This rule reflects Article 2's definition of a "sale" as "the passing of title from the seller to the buyer for a price." 810 Ill. Comp. Stat. 5/2-106(1) (2020). In *Meeker*, the grain bins contract was predominantly for goods where the contract stated that "title" would "remain in the Seller" until final payment. 442 N.E.2d at 924. By contrast, the *Nitrin* court held the ammonia plant contract predominantly for services because the defendant "never had title to any component part of the plant." 342 N.E.2d at 595 (citing a contract provision that "title to all machinery and equipment and supplies . . . shall, as between Owner and Contractor, be in Owner").

The Agreement repeatedly establishes that title to the Equipment will transfer from seller to purchaser, indicating, as in *Meeker*, a contract predominantly for goods. First, the Agreement provides that "Title to the Equipment will pass to Purchaser upon delivery." Agreement ¶ 6(d). Second, the contract's payment schedule identifies "Passage of Equipment title to Purchaser" as one of the payment milestones. *Id.* ¶ 3. Finally, the Agreement established that if Novelo terminated the contract or Helio breached, Novelo could "tak[e] title" to all materials, designs, and other work in progress. *Id.* ¶¶ 25(b)-(c), 27(a). Unlike the services contract in *Nitrin* where "title to all machinery and equipment" always

remained with one party, 342 N.E.2d at 595, title to the diesel-generator set began with Helio and would transfer to Novelo upon delivery of the Equipment or termination of the contract. These title transfer provisions indicate that the Agreement was likely a contract predominantly for the sale of goods.

D. *Whether Goods Form the "Heart of the Agreement"*

Illinois courts applying the predominant-purpose test distinguish "general construction contracts," which are predominantly for services, from contracts that contain services but nonetheless are predominantly for goods. *Boddie*, 455 N.E.2d at 150. General construction contracts often require the seller or contractor, rather than the buyer, to prepare the worksite. *Id*. In *Boddie*, a contract for a mail conveyor system was a general construction contract because it required the contractor, not the purchaser, to install the foundation ("construct caisons"), build "lookout galleries," and perform "extensive excavation and demolition." *Id*. By contrast, in *Hendrix*, the court concluded that the agreement to build a farm shed was a contract for goods and "*not* a standard general construction contract *encompassing site preparation*." N.E.2d at 259 (emphases added). In that case, the contract made the purchaser, not the builder, responsible for "obtaining necessary building permits" and "clearing and leveling" the worksite. *Id.*; *accord Pittsburgh-Des Moines Steel Co.*, 532 F.2d at 575 (water tank contract was predominantly for goods because it required the purchaser, not the seller, to buy land, build the foundation, and dig several wells).

The Agreement's silence on site preparation suggests, as in *Hendrix*, a contract predominantly for goods. The Agreement never mentions purchasing land, "clearing" or "leveling" the worksite, or pouring foundation, which the *Boddie* and *Hendrix* courts associated with general construction contracts. Furthermore, the Agreement expressly obligates Novelo to "obtain . . . all necessary state and local permits," which *Hendrix* cited as evidence of a contract predominantly for goods. Agreement ¶ 8(a).

However, courts have also identified individualized design work and installation of utilities as characteristics of general construction contracts. *Hendrix*, N.E.2d at 259. In *Hendrix*, the court determined that the agreement was not a general construction contract because the farm shed involved "non-creative, formula-like construction" rather than "detailed individual designing." *Id.* (citing *Meeker*, 442 N.E.2d at

922-23). The court also noted that the agreement "specifically did not cover any electrical wiring, plumbing, [or] heating," *id.* at 257, and therefore was not a "standard general construction contract encompassing . . . installation of services," *id.* at 259. By contrast, the agreement to build a mail conveyor system in *Boddie* was a general construction contract because it required the contractor to connect "exterior utilities and services." 455 N.E.2d at 150.

By these standards, the Agreement resembles a general construction contract predominantly for services because it required Helio both to custom-design and to install the Equipment. First, the Agreement required Helio not only to follow Novelo's custom design specifications, but also to attend in-person design meetings, communicate monthly with Novelo's Project Engineer, and consult Novelo about "all significant design options." *Id.* ¶ 4. Thus, the diesel-generator set arose from a complex and individualized design process, far from the "non-creative, formula-like construction" involved in *Hendrix*. Second, although the original Agreement required Novelo to install the Equipment, *id.* ¶ 8(a), the Contract Change Order shifted responsibility to Helio "to install the diesel-generator set." Novelo Facts ¶ 35. While installing the Equipment, Helio might also have set up electrical wiring, plumbing, heating, and other utilities. If so, then those added responsibilities, along with the individualized design work, could suggest that the Agreement was a general construction contract beyond the scope of Article 2.

But Illinois courts have concluded that even contracts involving design and installation are predominantly for goods where goods form the "heart" of the agreement. *Republic Steel Corp. v. Pa. Eng'g Corp.*, 785 F.2d 174, 181 (7th Cir. 1986). In *Republic Steel*, a contract for steel furnaces was predominantly for goods even though it required the seller to design, manufacture, and install the equipment. *Id.* at 176-77. The court reasoned that although the services were "substantial," they all "led directly to the construction of the furnaces," which formed "the heart of the Agreement." *Id.* at 181. The court reached this conclusion after observing that the contract never mentioned services without also referring to the furnaces. For example, a fee provision referred to "compensation for all other services performed *and items supplied*." *id.* at 180 (emphasis added). Another section obligated the manufacturer to arrange "all services necessary to erect and install the *[furnace] vessels*." *Id.* at 181 (emphasis added).

Even though the Agreement bears some characteristics of a general construction contract, Article 2 likely applies because as in *Steel Republic*, the goods form the "heart" of the transaction. First, Novelo's reasons for hiring Helio directly involve the Equipment: Helio had previously "manufactured similar *equipment*," *id.* ¶16 (emphasis added), and therefore possessed the "experience, capability, and expertise to design and fabricate generation *equipment*." *Id.* ¶ 1 (emphasis added). Second, Novelo itself identified the diesel-generator set as the "principal equipment item" needed for its new facility. *Id.* ¶¶ 8-9. Third, Helio's obligation to provide technical assistance centers around the Equipment: Helio would provide assistance beginning with the delivery of the Equipment and ending upon Novelo's acceptance. ¶ 8(d). Furthermore, the Agreement states that the technical assistance hours are part of the total "price of the Equipment," which serves as "total consideration" for both "Equipment and services" alike. *Id.* ¶ 3. Fourth, even the payment milestones revolve around the Equipment: the Agreement required Novelo to make payments when Helio submitted drawings and designs, completed "Engine Factory Testing," and passed "Equipment title" to Novelo. *Id.* As in *Steel Republic*, the contract involved substantial services that all "led directly to the construction" of the Equipment, which formed "the heart of the Agreement." *Republic Steel*, 785 F.2d at 181. Therefore, Article 2 likely applies to the transaction between Helio and Novelo.

**CONCLUSION**

A court will probably conclude that the Agreement falls under Article 2 because the Equipment satisfies the definition of "goods" and because the sale of goods formed the contract's predominant purpose.

First, the diesel-generator set qualifies as a "good." Because the Agreement was a contract for future goods, identification occurred no later than when Helio shipped the Equipment. Thus, the Equipment was movable at the time of identification, which makes the Equipment a "good" even if it became immovable after assembly or installation.

Second, the Equipment sale formed the contract's predominant purpose because the Agreement bears multiple characteristics that Illinois courts routinely recognize in contracts predominantly for goods.

The Agreement labels Novelo and Helio "Purchaser" and "Seller" consistently throughout the contract. It also includes a warranty for Equipment defects that runs to the goods and not the services. In addition, it establishes that title to the Equipment will begin with Helio and transfer to Novelo after delivery. Finally, even though the Agreement involves services often found in general construction contracts, those services all lead directly to the construction of the Equipment, which formed the "heart" of the Agreement. Therefore, the Agreement is most likely a contract predominantly for goods within the scope of Article 2.

## Applicant Details

| | |
|---|---|
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## Applicant Education

| | |
|---|---|
| BA/BS From | **City University of New York-John Jay College of Criminal Justice** |
| Date of BA/BS | **May 2016** |
| JD/LLB From | **University of Pittsburgh School of Law**<br>**https://www.law.pitt.edu/** |
| Date of JD/LLB | **May 10, 2019** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Pittsburgh Tax Review** |
| Moot Court Experience | **Yes** |

| | |
|---|---|
| Moot Court Name(s) | **The Jeffrey G. Miller National Environmental Law Moot Court Competition, Murray S. Love Moot Trial Court Competition** |

## Bar Admission

Admission(s) **New York**

## Prior Judicial Experience

| | |
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| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **Yes** |

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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April 26, 2023

Hon. Kiyo A. Matsumoto
United States District Court for the New York Eastern District
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I care deeply about maintaining and enforcing the rule of law, and I am writing to express my strong interest in serving as your law clerk. I am currently a law clerk for the Honorable Ellen Gesmer in the First Department Appellate Division of New York, with prior experience as an Assistant District Attorney ("ADA") at the New York County District Attorney's Office ("DANY"). I would welcome the opportunity to serve as your law clerk.

I selected a clerkship with Judge Gesmer specifically to become a better litigator and to strengthen my writing skills. As a law clerk, Judge Gesmer has mentored me in successful courtroom strategy, compelling legal arguments, and clear legal writing. I have already drafted an opinion on a criminal evidentiary ruling, written numerous reports on criminal and civil appeals and motions, as well as observed numerous oral arguments by appellate advocates in numerous areas of the law.

As an ADA, I managed an extensive caseload of crimes, the vast majority of which were violent crimes, and some were white collar crimes. As an ADA, I was responsible for all aspects of investigating and litigating a case. I assessed the facts of hundreds of criminal cases, interviewed numerous witnesses, identified critical issues in cases, and used my investigative skills to strengthen the evidence. I have also tried a case to verdict, conducted multiple suppression hearings, and presented dozens of cases to the Grand Jury. I have handled shooting cases, an attempted murder case, domestic violence cases, narcotic cases, two long-term fraud investigations, and I served as the lead counsel for a five-person gun point home invasion case. I have written dozens of search warrants for premises, pen registers, cell sites and social media. In addition to trials and investigations, I have written several post-conviction motions covering the Domestic Violence Survivors Justice Act, COVID-19, and ineffective assistance of counsel.

I was also fortunate enough to intern for the Honorable Edgardo Ramos in the U.S. District Court for the Southern District of New York. I drafted three opinions that decided issues including whether a motion to dismiss should be granted under an Americans with Disabilities Act claim, a Social Security adjudication, and an arbitration agreement. I also interned in the appeals unit in the Brooklyn District Attorney's Office where I wrote several appellate briefs that were submitted to the Second Appellate Department in New York. Overall, I had the opportunity to work substantially on my legal writing and obtain feedback from experienced judges and attorneys.

While in law school, I served as the Executive Editor, second to the Editor in Chief, for the *Pittsburgh Tax Review*. My responsibilities included distributing cite and source assignments, conducting Bluebook trainings, and being the third level of review for cite and source assignments. My note on low-income housing tax credits was published.

I believe that my current and past experiences have provided me with the capabilities needed to succeed as your law clerk. This position will allow me to contribute meaningfully and showcase the skills I have acquired.

Sincerely,
Javon Henry

# Javon Henry

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**LICENSED TO PRACTICE IN NEW YORK**

## EDUCATION

**University of Pittsburgh School of Law**, J.D., Pittsburgh, PA, May 2019
Honors and Awards: Public Interest Scholarship | Chuck Cooper Scholarship | Murray S. Love Mock Trial Competition, *Semi-finalist* | Environmental Law Moot Court Team, *Top 7 Brief*
Activities: Pittsburgh Tax Review, *Executive Editor* | BLSA, *Vice President* | Marshall Brennan Constitutional Literacy Program, *Fellow* | Allegheny County D.A.'s Criminal Law Practicum, *Certified Intern* | *Research Assistant* (Professor Gerald Dickinson, 2L) | Lexis Nexis, *Student Rep.*

**John Jay College of Criminal Justice**, New York, NY, B.A., Political Science, May 2016
Honors and Awards: John Jay Scholarship | Dean's List Fall 2014–Spring 2016 | Edward T. Rogowsky Scholarship | Latin American Studies Minor Honors | Political Science Major Honors
Activities: Ronald H. Brown Program, *Fellow* | Jamaican Student's Association, *Treasurer*
Study Abroad: Universidad Nacional De Tres De Febrero, Buenos, Aires, Argentina, January 2015

## LEGAL EXPERIENCE

**New York Supreme Court, First Department Appellate Division, Hon. Ellen Gesmer,** New York, NY
*Term Law Clerk,* December 2022 – Present
- Draft opinions and reports on criminal and civil appeals and motions

**New York County District Attorney's Office**, New York, NY
*Assistant District Attorney, Trial Division,* September 2019 – December 2022
- Lead prosecutor on felony caseload of approximately fifty cases from arrest through final disposition
- Drafted pleading documents, motions, post-conviction motions, and search warrants
- Acted as first chair and second chair in misdemeanor and felony suppression hearings and jury trials
- Presented dozens of cases to the Grand Jury
- Supervised Summer 2022 college and law school interns

**U.S. Attorney's Office, Western District of Pennsylvania**, Pittsburgh PA
*Legal Intern,* September – December 2018
- Drafted memoranda on topics such as obstruction of justice and Hobbs Act Robbery and drafted a habeas motion

**Brooklyn District Attorney's Office, Appeals Bureau**, Brooklyn, NY
*Legal Intern,* June – August 2018
- Drafted appellate briefs on criminal procedure, the Sex Offender Registry Act, and insufficient evidence
- Conducted a mock *Huntley* suppression hearing and a moot appellate argument

**Bayer Health Care LLC, Radiology Department**, Indianola, PA
*Legal Intern,* December 2017 – April 2018
- Reviewed and drafted sales and service contract terms and conditions

**U.S. District Court, Southern District of New York, Hon. Edgardo Ramos**, New York, NY
*ABA JIOP Judicial Intern,* June – August 2017
- Drafted opinions and orders on motions for summary judgment, due process claims and judicial review of agency adjudication issues regarding Social Security claims
- Observed trials, sentencing hearings, pre motion hearings and an oral argument in the Second Circuit

**New York Supreme Court**, **Civil Court, Hon. Francois Rivera,** Brooklyn, NY
*Judicial Intern,* June – August 2016
- Drafted opinions on New York State civil procedure law and rules, labor law, and property law
- Presented weekly summaries to Judge of the top ten cases posted by the New York State second department appellate court

## PUBLICATIONS

Javon Henry, Note, *Low Income Housing Tax Credits and the Dangers of Privatization*, 16 PITT. TAX REV. 247 (2019).